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No. 07-

IN THE

Supreme Court of the United States

THOMAS P. NIXON,

Petitioner,

v.

CITY OF HOUSTON AND HAROLD HURTT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. With its opinion in *Garcetti v. Ceballos*, this Court modified the front half of the *Pickering/Connick* balancing test by implicitly eliminating "public concern" as a consideration in determining if employee speech is afforded First Amendment protection. In light of this modification, the first question presented here is whether clarification of how the balance on the back half of the test should be struck to preserve U.S. Supreme Court precedence that 1) the weight of the government employers' burden increases as the employee's speech involves greater matters of public concern, and 2) the balancing test demands a showing of internal, not external disruption.

2. The court's opinion in *Nixon v. City of Houston* reveals there is an inconsistency among the Circuits regarding whether speech made outside the employee's scope of employment duties is protected. The second question presented is whether this Court's opinion in Garcetti has been improperly expanded by 1) not affording First Amendment protection to speech which is not "authorized" nor "part of regular duties", but is simply made "in the course of" performing one's job, and 2) adding a "continuation" rule to the test.

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Thomas P. Nixon, the Plaintiff in the District Court and Appellant in the Court of Appeals, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Thomas P. Nixon v. City of Houston, et al, 5th Circuit Docket No. 07-20162* (January 10, 2008)

OPINIONS BELOW

The Court of Appeals opinion is not reported but is reproduced as Appendix A to this petition (hereinafter referred to as Pet. App.).

The District Court's Order dated January 25, 2007, is reproduced as Appendix B.

STATEMENT OF JURISDICTION

The Court of Appeals judgment was entered on January 10, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

42 U.S.C. § 1983, the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, United States Constitution.

STATEMENT OF THE CASE

Prior to August of 2005, Petitioner Thomas Nixon, a former Houston Police Department police officer, was a featured columnist in a local Houston magazine, 002 Magazine. While the content of some of his articles are

admittedly distasteful, they also contained allegations that HPD made policies to create a profit, improperly spent tax dollars, failed to protect the public because it diverted police resources to benefit supervisors, wasted resources on marketing and inappropriately conducted investigations. (Pet. App. B, 31a). HPD initiated an investigation into these articles in August 2005, yet did not take disciplinary action until after Nixon made statements to the media regarding HPD's police chase police in January, 2006. (Pet. App. B, 18a). During this six month time period, however, there is not a single complaint from Nixon's coworkers about the substance of Nixon's articles; there was no evidence that his articles created discord and disharmony in the department, no evidence that Nixon's supervisors were unable to control him; and there was no evidence that Nixon was somehow unable to do his job. Also, there was no other indication that HPD could not effectively run its department because of Nixon's speech.

On January 18, 2006, Nixon, while at home, watched the third high speed chase to occur in Houston in a matter of weeks. He went to the scene and when he got there, he saw a baby pacifier lying on the ground. He first asked to speak to the media but did not get a response. (Pet. App. A, 3a-4a). Although he did not get express approval, Nixon still felt that it was imperative that he say something. He felt that he must subject his own personal objections to HPD policy to broader scrutiny because he then felt that the public was at risk. Specifically, Nixon said the HPD was "not protecting the public when infants are injured because we don't put a stop to suspects that are running from us committing felonies." (Pet. App. B, 32a, fn. 25). Immediately after

these statements, HPD put Nixon on administrative status pending an investigation. He also was ordered not to speak with the media regarding department policy or ongoing investigations in his capacity as an HPD officer and as a private citizen.[1] Nixon was officially terminated in June of 2006.

On January 25, 2007, the District Court granted Defendants' Motion for Summary Judgment. On December 19, 2007, the Fifth Circuit issued its opinion affirming the District Court's Judgment.

REASONS FOR GRANTING THE PETITION

I. IN LIGHT OF THE MODIFICATIONS TO THE FRONT HALF OF THE PICKERING/CONNICK BALANCING TEST MADE IN *GARCETTI v. CEBALLOS*, CLARIFICATION ON HOW THE BALANCE ON THE BACK HALF OF THE TEST SHOULD BE STRUCK IS REQUIRED TO PRESERVE LONG STANDING UNITED STATES SUPREME COURT PRECEDENT.

Since this Court in *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006) implicitly eliminated "public concern" as the litmus for determining whether a government employee retains First Amendment protection for his or her speech, lower courts have, in applying the Pickering/Connick balancing test, given too much deference or

[1] This part of the employer's order relating to Nixon's private speech was rescinded following the District Court's issuance of a temporary restraining order and prior to the temporary injunction hearing.

weight to the government's interest in maintaining an environment totally devoid of unwelcomed speech. *See e.g., Nixon v. City of Houston*, No. 07-20162, 2007 WL 4418165 (5th Cir. December 19, 2007) (Pet. App. A) (providing no consideration to public's right to hear Nixon's speech on matter that directly affects its health and welfare). In other words, because now, under *Garcetti*, speech relating to a matter of public concern can be presumptively unprotected if it falls within the scope of a government employee's official duties, it should be more important, not less, that, under the back half of the Pickering/Connick balancing test, the public's interest in hearing well-informed views of public employees be given adequate and just consideration.

To meet this objective, the evidentiary showing required by a government employer to sustain its burden of proof that its interests outweigh the speaker's should be directly linked, as it has been since *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977), to the extent to which the government employee's speech touches on a matter of public concern. The Fifth Circuit, in its recent decision in *Nixon v. City of Houston*, (Pet. App. A,), violated established United States Supreme Court precedent by failing to provide proper weight to the public's interest in hearing statements on matters of public concern as it based its decision to suppress speech involving a topic of great public concern solely on the City's unsupported predictions of disruption without requiring proof of actual disruption or meeting the requisite substantial showing of interference with its operations to justify repressing protected speech. *Id.*

Lastly, the Pickering/Connick balancing test should focus on the impact of the speech on internal, and not external, relationships to prevent the ultimate factor determining protection from being, simply, public reaction, which is in direct violation of this Court's prohibition against using the heckler's veto to curtail offensive speech. *See Edwards v. South Carolina*, 372 U.S. 229, 236 (1963). Currently, the circuits are split on this—the Fifth Circuit allows consideration of external factors, namely public reaction, *see Nixon*, (Pet. App. A, 11a-13a), and the Eighth and Fourth Circuits, limit the focus to internal considerations, *see Flanagan v. Munger*, 890 F.2d 1557, (8th Cir. 1989); *Berger v. Battaglia*, 779 F.2d 992, 998 (4th Cir. 1985). Petitioner's Petition for Writ of Certiorari should be granted, then, to correct the Fifth Circuit's misapplication of United States Supreme Court precedent and to resolve the split between the circuits on whether the Pickering/Connick balancing test factors should be focused exclusively on internal disruption or if the courts should consider external factors as well.

A. To Preserve the Public's Right to Informed Opinions from Government Employees and to Comply with Existing Court Precedent Providing Proper Balance to All Competing Interests in Government Employee Speech, the Weight of Government Employer's Burden and Corresponding Evidentiary Proof Required Should Increase As the Speech Involves Greater Matters of Public Concern.

"[P]ublic employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations

which are of substantial concern to the public." *San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam); *Connick v. Meyers*, 461 U.S. 138, 145 (1983) ("[T]he Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.") (quotations omitted). If they are not able to speak on these matters, "the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *Roe*, 543 U.S. at 82.

To avoid depriving the public of its right to these informed opinions, this Court in *Connick v. Meyers*, used "public concern" as a litmus test for determining the amount of protection to afford government employee speech. 461 U.S. 138, 150 (1983). Specifically, the *Connick* Court recognized the need for a sliding scale approach to provide proper protection to all competing interests: "[T]he state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression. Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests." *Id.*

When, as in *Connick*, the speech at issue "touch[es] upon matters of public concern in only the most limited sense," the employer's burden can be discharged if it "reasonably believed [that the speech] would disrupt the office." *Id.* at 154. Conversely, when the speech involves a stronger showing of public concern, more from the employer is required and the pertinent inquiry, instead, is "whether the speech at issue, given the context and

the employee's duties, actually impaired office operations." *Kinney v. Weaver*, 367 F.3d 337, 362 (5th Cir. 2004) (citing *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (involving speech that "plainly dealt with a matter of public concern")).[2] Indeed, the *Connick* Court

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[2] *See also Vojvodich v. Lopez*, 48 F.3d 879, 885 (5th Cir. 1995) ("Stronger showing of disruption may be necessary if the employee's speech more substantially involves matters of public concern."); *Hall v. Marion Sch. Dist. No. 2*, 31 F.3d 183, 194-95 (4th Cir. 1994) (stating that where "employee's speech substantially involves matters of public concern, ... the [government] must make a stronger showing of disruption" to prevail); *Rameriz v. Oklahoma Dep't of Mental Health*, 41 F.3d 584, 594 (10th Cir. 1994) (stating that defendants must show "actual disruption of services which results from the employees['] speech" in order to justify retaliatory action) (quotations omitted); *Bieluch v. Sullivan*, 999 F.2d 666, 671 (2d Cir. 1993) (same); *Hyland v. Wonder*, 972 F.2d 1129, 1139-40 (9th Cir. 1992) ("The more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made. ... Actual, material and substantial disruption must be demonstrated [and] [m]ere allegations of interference with a working relationship cannot serve as a pretext for stifling legitimate speech.") (quotations omitted); *Conaway v. Smith*, 853 F.2d 789, 797 (10th Cir. 1988) (stating that "[s]peech that seeks to expose improper operations of the government or questions integrity of governmental officials clearly concerns vital public interest and that employee's First Amendment interest is entitled to greater weight."); *Donahue v. Staunton*, 471 F.2d 475, 480 (7th Cir. 1972) (observing that public employees have a right to criticize their employers because dismissal from their employment for making critical statements would "inhibit the propensity of a citizen to exercise his right to freedom of speech and association" and as a result, the defendants could not dismiss a hospital chaplain even though his accusations were extensive,

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cautioned that "a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." *Connick*, 461 U.S. at 152; *Gustafson v. Jones*, 290 F.3d 895, 910 (7th Cir. 2002) (holding that the mere incantation of "disruption to internal harmony in the workplace, is not enough to carry the day") (quotations omitted); *Kinney*, 367 F.3d at 363 (stating that "engaging in Pickering balancing is not like performing rational basis review, where we uphold government action as long as there is some imaginable legitimate basis for it").

The *Connick* holding was rooted upon this Court's decision in *Pickering v. Board of Education*, 391 U.S. 563, 571 (1968), and its progeny, all of which "involved safeguarding speech on matters of public concern." *Connick*, 461 U.S. at 145. Recognizing the importance of "free and open debate . . . to informed decision-making by the electorate," the *Pickering* Court flatly rejected the contention that, absent proof of actual disruption, critical comments on matters of public concern, alone, could be grounds for dismissal. 391 U.S. at 572-73. The Court instead required actual evidence of harm because, without it, speech would be repressed due solely to a difference of opinions:

> [T]he only way in which the Board could conclude, absent any evidence of the actual

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critical, vociferous and exaggerated and even false because the defendants did not show that plaintiff's accusations actually impeded the performance of his duties or interfered with the functioning of the hospital).

> effect of the letter, that the statements contained therein were per se detrimental to the interest of the schools was to equate the Board members' own interest with that of the schools[,] . . . reflect[ing] rather a difference of opinion between Pickering and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest.

Id.; *see also Rankin*, 438 U.S. at 384 ("Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of the employer's speech."). The Court further held that government employee speech on a matter currently the subject of public attention demanded as much protection as that of speech from a private citizen:

> What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in

> limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

Id. at 572-73.

The Court's decision in *Waters v. Churchill*, 511 U.S. 661 (1994) did not alter this landscape nor did it minimize, at all, the importance of a government employee's right "to speak out freely on such questions [of public concern] without fear of retaliatory dismissal." *Pickering*, 391 U.S. at 572. The dispute in *Waters* involved "how the factual basis for applying the [Pickering] balancing test—what the speech was, in what tone it was delivered, what the listener's reactions were, is to be determined." 511 U.S. at 668. When the underlying facts are disputed—for example if the parties disagree as to what was actually said as in *Waters*, the Court gave deference to "government employers' reasonable predictions of harm: "We think employer decisionmaking will not be unduly burdened by having courts look to the facts as the employer *reasonably* found them to be." *Id.* at 677. What was not at issue in *Waters*, however, was whether predictions of future disruptions could outweigh an employee's speech under *Connick* when it "more substantially involved a matter of public concern." 461 U.S. at 152.

Consistent with *Pickering* and its sliding scale assessment, the *Waters* Court then noted that what might be reasonable in a given situation was entirely fact dependent: "It may be unreasonable, for example,

for the employer to come to a conclusion based on no evidence at all. Likewise, it may be unreasonable for an employer to act based on extremely weak evidence when strong evidence is clearly available." *Id.* Deference to the employer's judgment, however, in the Court's mind, could not be complete. *Id.* Ultimately, the Court found the government employer's fact findings to be reasonable: "[I]f petitioners really did believe Perkins-Graham's and Ballew's story, and fired Churchill because of it, they must win. Their belief, based on the investigation they conducted, would have been reasonable." *Id.*

In reaching its conclusion, however, the Court preserved the analysis for speech involving a matter of public concern when the parties do not dispute what was spoken but rather disagree on whether the speech can be punished: "And a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters. In many such situations the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished." *Id.* ; *see also United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 483 (1995) (O'Connor, J., concurring in part, dissenting in part) ("As the magnitude of intrusion on employees' interests rises, so does the Government's burden of justification."). The Court also rejected the petitioner's argument that its decision was in conflict with *Mt. Healthy* or *Pickering*, noting that in these cases "the employer assertedly knew the true content of the employee's protected speech." *Id.* at 678.

Consequently, the Fifth Circuit erred in relying on *Waters* when it affirmed the suppression of Nixon's speech on a topic admittedly of great public concern—the public's safety threatened by HPD's police chase policy—based solely on purported reasonable predictions of disruption, particularly when the evidence proved to the contrary. Before the court was no evidence of actual disruption to HPD's internal operations from Nixon's speech. *Nixon* (Pet. App. A, 10a, n. 8). Nevertheless, ignoring the mandate from *Pickering*, *Connick* and their progeny, which require proof of actual disruption or a substantial showing that the speech is disruptive when it more significantly involves a matter of public concern, such as Nixon's speech regarding a policy directly impacting the public's health and welfare, the court still found that HPD's repressive actions were justified simply because it could, without evidentiary basis or historical support for its position, "reasonably predict" that Nixon's speech would harm HPD's operations. *Id.* (Pet. App. A, 10a-13a). A simple difference of opinions or disagreement with the content of speech should not, as a matter of law, satisfy the "substantial showing" this Court required in *Waters*.

Even under *Waters*, however, the Fifth Circuit's decision was erroneous as HPD had "strong[er] evidence ... clearly available,"[3] yet instead chose to rely,

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[3] The *Nixon* court based its decision to repress Nixon's media statements primarily because he was insubordinate in speaking and because the content of his speech violated HPD policy. *Nixon* (Pet. App. A, 10a). The court reasoned that Nixon's words "smack[ed] of insubordination, and it [wa]s entirely reasonable for HPD to predict such insubordination and likely

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unreasonably, on no evidence at all. Again, as a result of *Nixon*, government employers can now, in the Fifth Circuit, punish speech, under the guise of preempting disruption, simply because of a difference of opinion or because they disagree with the content of the employer's speech, a result absolutely prohibited by this Court's precedent. *See Pickering*, 391 U.S. at 571 (affirming Marvin Pickering's right to speak in part because Pickering's statements "would not normally have any necessary impact on the actual operation of the schools, beyond [their] tendency to anger the Board"). Petitioner's petition for writ of certiorari should, therefore, be granted to correct this error.

B. Pickering/Connick Demands a Showing of Internal, and Not External, Disruption to Prevent Speech from Being Repressed Due Solely to the Listener's Underlying Distaste for the Message Spoken.

Once more, to prevent the stifling of speech based entirely on its content, the focus on balance, as implicitly

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acts of future insubordination would harm HPD's ability to maintain discipline and order in the department, moral within the department and close working relationships between Nixon, his fellow officers, and his supervisors." *Id.* The record shows, however, that none of what the court predicted would happen actually happened when Nixon made far more egregious statements in '002 magazine. *See Gustafson*, 290 F.3d at 910 (7th Cir.2002) (finding that "where substantial time has passed without incident, it naturally becomes more difficult for an employer to satisfy its burden of proving that punishment on the basis of anticipated disruption was reasonable").

recognized in *Pickering* and *Connick*, should be internal disruption; external considerations, which, at their heart, amount only to adverse reaction to or distaste for content, should be excluded from the analysis. The *Pickering* Court, in fact, had equal opportunity to consider negative public perception as a potential factor to weigh in favor of the government's interest but instead chose to only look inward to the direct impact the speech had on the relationships within the government entity's office without giving any consideration to how the public perceived Marvin Pickering's statements. *Id.* at 569-70.

Relying on the Fourth Circuit's opinion in *Berger v. Battaglia*, 779 F.2d 992, 998 (4th Cir. 1985), the Eighth Circuit in *Flanagan v. Munger*, 890 F.2d 1557, 1566 (8th Cir. 1989), addressed this precise issue—the weight given to external factors, namely, a police department's interest in preventing the public's respect and confidence in the police department from eroding, which would, in turn, discourage citizens from cooperating with the department, thereby purportedly decreasing its efficiency and effectiveness, the same grounds relied upon by the Fifth Circuit for its decision to allow HPD to punish Nixon for his magazine articles. *Nixon*, (Pet. App. A, 12a-13a). The plaintiffs in *Flanagan* were police officers who owned an interest in a video store that distributed sexually explicit video tapes. *Id.* at 1560. This fact was reported in a local newspaper, much to the public's distaste. *Id.* at 1561. The chief of police responded by reprimanding the police officers for "Conduct Unbecoming an Officer." *Id.* The police officers sued, and the Eighth Circuit reversed the trial court's grant of summary judgment in favor of the police department. *Id.* at 1567.

First, relying on *Pickering* and *Connick*, the court said that the "'only interest a public employer can have that could conceivably outweigh a citizen's right to free speech is its interest in avoiding direct disruption by the speech itself of the public employer's ***internal*** operations and employment relationships.'" *Id.* at 1566 (quoting *Berger*, 779 F.2d at 998) (emphasis added). The court then noted that, as in *Nixon*, the "record [wa]s devoid of evidence of actual, or potential, disruption of the department's internal operations" and that the defendants' cases "revolve[d] solely around evidence of the potential disruption of the department's *external* relationships and operations." *Id.* Since the allegations involved only disruption of external operations, for example, impact on public perception, the court refused to justify the defendants' actions under *Pickering*. *Id.* The court then held that if public perception were a consideration, in order to outweigh the speaker's interest, it would have to rise to nothing short of a direct incitement to violence:

> Here not only was the perceived threat of disruption only to external operations and relationships, it was caused not by the speech itself but by threatened reaction to it by offended segments of the public. Short of direct incitements to violence by the very content of public employee speech . . . this sort of threatened disruption by others reacting to public employee speech simply may not be allowed to serve as justification for public employer disciplinary action directed at that speech.

Id.; *see also Melzer v. Bd. of Education*, 336 F.3d 185, 198-99 (2d Cir. 2003) (limiting factors consider on balance to factors creating internal disruption); *Worrell v. Henry*, 219 F.3d 1197 (10th Cir. 2000) ("[A]cting with retaliatory intent, a third party upon whose cooperation the employer depended could refuse to cooperate with the employer unless a particular employee was fired, demoted or transferred. By withholding cooperation, the third party could effectively create the very workplace disruption that . . . could be used to justify the limitation of First Amendment rights.").

The court also refused to justify the department's disciplinary action simply because some members of the public might find the plaintiff's conduct offensive and for that reason, might not cooperate with law enforcement officers in the future. *Flanagan*, 890 F.2d at 1566. This "heckler's veto" has been squarely rejected by this Court in *Edwards v. South Carolina*, 372 U.S. 229 (1963)[4] and *Terminiello v. Chicago*, 337 U.S. 1 (1949) ("Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have

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[4] In *Edwards*, protestors were convicted for breach of the peace. 372 U.S. at 233-34. This Court reversed the conviction, finding that the plaintiffs were found guilty on evidence showing only that their opinions for which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and require police protection. *Id.* at 235-36. To allow this, the Court held, would lead to standardization of ideas either by legislatures, courts or dominant political or community groups. *Id.* at 236; *see also Feiner v. New York*, 340 U.S. 315, 320 (1951) ("[T]he ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker.").

profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.").[5] *See also Berger*, 779 F.2d at 998 (relying on heckler's veto to refuse to consider public perception as factor to justify government suppression of free speech); *cf. Melzer v. Board of Education of City School Dist. of City of New York*, 336 F.3d 185 (2d Cir. 2003) (acknowledging "the truism that community reaction cannot dictate whether an employee's constitutional rights are protected," but finding heckler's veto inappropriate under facts of case as disruption was internal). *But see Dible v. City of Chandler*, 515 F.3d 918, 1051 (9th Cir. 2008) (declining to follow *Flanagan* and *Berger* regarding the heckler's veto to the extent "that they minimize the potential for an actual effect on the efficiency and efficacy of police department functions arising from public perceptions of the inappropriate activities of police officers"). Though this "veto" has probably been most frequently exercised through "legislation responsive to majority sensibilities, the same assault on first amendment values of course occurs when, as here, it is exercised by executive action responsive to the sensibilities of a minority." *Berger*, 779 F.2d at 1001.

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[5] *Terminiello* involved the constitutionality of a breach of peace ordinance that defined breach as "speech that stirs the public to anger, invites dispute, brings about a condition or unrest, or creates a disturbance." 337 U.S. at 3. The court found the ordinance unconstitutional because it "permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest." *Id.* at 5.

The *Flanagan* court lastly found that the potential ramifications of allowing discipline based on the public's reaction to the speech to be alarming. 890 F.2d at 1567. What if the public objects to or is offended by an officer's religious affiliations or membership in another type of disfavored group, the court asked. *Id.* Legitimately fearing the stifling impact on the future exercise of First Amendment rights, the court correctly concluded that "there are strong first amendment values in the free exercise of religion and in the freedom of assembly which could be severely restricted if the external objectors' justifications were allowed to be applied in these cases." *Id.*

In contrast, the Fifth Circuit rested its decision entirely on external factors, finding that "[g]iven the exposure of Nixon's articles to the Houston community and the caustic statements in some of his articles, it was reasonable for HPD to believe that his articles would negatively impact the relationship between HPD and Houston citizens." *Nixon*, (Pet. App. A, 13a). This decision directly contradicts *Berger* and *Flanagan*, and accordingly, Petitioner's petition for writ of certiorari should be granted to resolve the conflict.

II. *GARCETTI*'S PROSCRIPTION AGAINST ELIMINATING ALL PROTECTION FOR GOVERNMENT EMPLOYEE SPEECH HAS BEEN EVISCERATED BY THE FIFTH CIRCUIT'S DECISION IN *NIXON v. CITY OF HOUSTON*, WHICH NOW EXCLUDES AS UNPROTECTED SPEECH MADE OUTSIDE SCOPE OF DUTIES AND SPEECH MADE OFF-DUTY BUT THAT RELATES TO SOMETHING SAID WHILE ON THE JOB.

The Fifth Circuit's decision in *Nixon* also creates a split in the circuits regarding the manner in which the courts handle statements that are not made under direct orders from a superior. In the Fifth Circuit now, unlike in other circuits, a statement can still be considered as required by a government employee's job even though it is "not a part of his [or her] job duties." *Nixon* (Pet. App. A, 8a-9a). Moreover, by finding off duty statements unprotected when they somehow "constitute a continuation" of earlier on-the-job statements, *Nixon*, (Pet. App. A, 9a), the Fifth Circuit has all but undercut *Garcetti*'s protections for government employee speech. Petitioner's Petition for Writ of Certiorari should, therefore, be granted to resolve the conflict between the circuits regarding the treatment of speech made while outside an employee's scope of employment and to reverse the Fifth Circuit's decision all but banning all the protections *Garcetti* afforded government employee speech.

A. By Finding That Statements Made Without Express Authorization or Approval and That Were Not Made Under Supervisory Direction Fall Within an Employee's Scope of Duties the Fifth Circuit Unnecessarily Expands *Garcetti* in Conflict with the Other Circuits.

This Court in *Garcetti* was clear that its opinion "relate[d] only to the expressions an employee makes pursuant to his or her official responsibilities, not to statements or complaints (such as those at issue in cases like *Pickering* and *Connick* that are made outside the duties of employment." 126 S.Ct. at 1961. In order to preserve this right that government employees have to complain, the Court limited unprotected speech to that which "the employer itself has commissioned or created," that is, government work product. *Id.* at 1960. By doing this, the Court noted, it would preserve government employees' right to participate in public debate or speak publicly on matters of public concern.[6] *Id.* This could occur, as the Court found, "inside the office," or it could come in the form of complaints about an issue of public interest, or statements made, not through internal channels, which are only available to employees, but instead to the public through outlets available to any citizen. *Id.* at 1959-61. The Court also found that this speech could also relate to the subject matter of employment. *Id.* At 1959. Thus, the Court sought to continue, as it has since *Pickering*, to encourage "those

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[6] Richard Ceballos did speak publicly, but, ultimately, the Court determined that it was because he was subpoenaed to do so—his speech was, thus, compelled by is job, and he did not make his statements voluntarily, like Nixon. *Id.*

the members of a community most likely to have informed and definite opinions about the effective operations of the government employer to be able to speak out freely on such questions without fear of retaliatory dismissal."

Following this mandate, the Ninth and Tenth Circuits properly found that unauthorized complaints, made without approval or express authorization fell outside the scope of *Garcetti*, warranting protection. For example, the Tenth Circuit in *Casey v. West Las Vegas Independent School District.*, 473 F.3d 1323 (10th Cir. 2007), found that speech made in violation of direct orders retained its first amendment protection. Casey was hired as Superintendent of the School District in January, 2002. *Id.* at 1325. Her job responsibilities included oversight of the District's Head Start program, in which she discovered serious irregularities. *Id.* She reported the problems to the School Board, which told her "to leave it alone, or not to go there." *Id.* at 1326. Against the instructions of the Board, Casey contacted the regional Head Start authorities to convey her concerns about the legality of the District's Head Start program. *Id.* After the Board ignored her warning that it was violating the New Mexico Open Meetings Act, she filed a written complaint with the New Mexico Attorney General's office, which ordered corrective action after its investigation determined that Casey was correct. *Id.* In 2003, the School District demoted her to Assistant Superintendent, then refused to renew her contract. *Id.* She sued alleging that she was dismissed in retaliation for exercising her First Amendment rights. *Id.*

The Tenth Circuit concluded that Casey's speech regarding the Head Start program, including her communication to the Head Start Regional Office in Dallas, was not protected because it was "more akin to that of a senior executive acting pursuant to official duties than to that of an ordinary citizen speaking on his or her own time." *Id.* at 1331. The Court observed that employees have an obligation to report an employer's improprieties in the handling of federal funds, and "that the responsibility to deal with known misconduct can be no less emphatic when the employee at issue is a CEO or Superintendent and similar disclosure obligations exist." *Id.* at 1332. The Court then found that Casey's contact with the New Mexico Attorney General's office, in contrast, was protected speech because Casey was not seeking to fulfill her professional responsibility to advise the Board; rather, she had lost faith in the Board so she took her grievance to the Attorney General. *Id.*

The Ninth Circuit in *Freitag v. Ayers* likewise found that an employee's speech was protected because she exceeded the scope of authority to publicly make complaints about her job. 468 F.3d 528, 545 (9th Cir. 2006). Freitag, a correctional officer, wrote a series of letters, and even filed a formal complaint, about the hostile work environment created by one prisoner first to her supervisors, then to the prison warden. *Id.* at 533-34. Freitag's letters and complaints were all ignored. *Id.* Freitag next informed her local senator and an administrative investigative body, who immediately initiated an investigation into the matter. *Id.* Shortly after the investigation, Freitag was fired. *Id.*

In refusing to strip Freitag of all of her First Amendment protections, the court held that "[u]nder *Ceballos*, Freitag does not lose her right to speak as a citizen simply because she initiated the communication while at work or because they concerned the subject matter of her employment." *Id.* at 545. Indeed, the court held that Freitag's protection was tied directly to what she was required to do at work: "It was certainly not a part of her official tasks to complain to the Senator or the [Inspector General]." *Id.* In contrast, Freitag, as a correctional officer, was required, as a part of her official duties, to report inmate misconduct to her superiors. *See id.* at 534 (discussing policy of referring repeat offenders to the district attorney's office for prosecution). Moreover, the misconduct revealed in Freitag's complaints to prison administration concerned inmates that her position as a correctional officer required her to supervise and discipline. *Id.* Thus, her critique of inmates was a part of the "'work . . . [s]he was paid to perform.'" *Id.* at 544 (quoting *Garcetti*, 126 S.Ct. at 1960); *see also Marable v. Nitchman*, 511 F.3d 924 (9th Cir. 2007) (finding that the plaintiff's speech was protected because "his job was to do the tasks of a Chief Engineer on his ferry, and such tasks did not include pointing to corrupt actions of higher level officials whom he purportedly thought were abusing the public trust and converting public funds to their own use by overpayment schemes").

Unconcerned by *Garcetti*'s caution to avoid an overly expansive construction of its opinion, the Fifth Circuit, in conflict with the Ninth and Tenth Circuits, found that even though "speaking to the press was not part of his regular job duties. . . . Nixon's statement was made while

he was performing his job." *Nixon*, (Pet. App. A, 8a-9a). The court then reasoned that "the fact that Nixon performed his job incorrectly in an unauthorized manner, or in contravention of the wishes of his superiors does not covert this statement at the accident scene into protected citizen speech." *Id.* Not only does the Fifth Circuit opinion create a split in the circuits, it also forbids, unconstitutionally, government employees from making any "complaint[ ] about an issue of public interest, or statements . . . to the public through outlets available to any citizen, *Garcetti*, 126 S.Ct. at 1959-61, as the majority, if not all, of such statements would undoubtedly be made in "unauthorized manner, or in contravention of the wishes of his superiors." Thus, Petitioner's petition for writ of certiorari should be granted to resolve this conflict and correct the Fifth Circuit's error.

B. Denying Protection to Off-Duty Statements Because They Somehow Related to Something Said While On the Job Will Strip Government Employees of Their Remaining Rights to Free Speech Under *Garcetti*.

This Court, in *Garcetti*, recognized that First Amendment protection still exists for employees "who make public statements outside the course of performing their official duties." *Id.* at 1961. In *Nixon*, the court obliterated the possibility of such protection in its pronouncement of a "continuation rule". (Pet. App. A, 9a). The court chose to deny protection to Nixon for voluntary comments made to the media about the chase policy while off duty, not in uniform and with no duty to do so, merely because the statements "constitute a

continuation of Nixon's accident-scene statement the previous day criticizing HPD and its high-speed pursuit policy . . ." *Id.*

This unprecedented rule leaves an employee with nowhere to turn with information that might be valuable to the public. It also flies in the face of the Court's suggestion to employers in *Garcetti* to provide "an internal forum (for employee speech) [to] . . . discourage them from concluding that the safest avenue of expression is to state their views in public." *Id.* at 1961. Following the court's pronouncement of this continuation rule, any employee who received no response (or as in Ms. Casey's predicament, is told "don't go there" *Casey*, at 1326) would no longer have protection when submitting their speech to broader public scrutiny in a manner which was clearly not pursuant to official duties. This decision, furthermore, runs afoul of *Garcetti*'s attempt to preserve the government employee's longstanding right to speak about matters related to his or her job. 126 S.Ct. at 1959 ("The First Amendment protects some expression related to the speaker's job."). In fact, this new theory permits precisely what this Court has vigilantly attempted to prevent—providing the employer with unfettered discretion to punish speech not because it interferes with its operations but rather simply because it "reveals facts that the supervisor would rather not have any one else discover." *Id.* at 1962 (Stevens, J., dissenting). Therefore, the Court should grant this Petition for Writ of Certiorari in order to correct this clearly erroneous precedent.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED DECEMBER 19, 2007

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-20162

THOMAS P. NIXON,

Plaintiff-Appellant,

v.

CITY OF HOUSTON; HAROLD HURTT,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas
USDC No. 4:06-CV-296

Before GARWOOD, GARZA and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:

On January 27, 2006, Thomas Nixon, a patrol officer with the Houston, Texas Police Department ("HPD"), filed a § 1983 suit against the City of Houston and Chief of Police Harold Hurtt ("Appellees") for employment retaliation in violation of his First Amendment right to

free speech. Specifically, Nixon claims that his fifteen-day temporary suspension and his later indefinite suspension ("termination")[1] from HPD for making various statements during media interviews and in publications he authored violated his First Amendment rights.

In this appeal, Nixon seeks a reversal of the district court's grant of summary judgment in favor of Appellees. Because we find that Nixon's speech was not protected by the First Amendment, we affirm.

I. BACKGROUND

A. Nixon's "The Insider" Articles

Between May 2004 and January 2006, Nixon wrote a monthly column entitled "The Insider" in *002 Magazine*, a local Houston periodical.[2] In such articles, Nixon identified himself as a police officer, discussed his police-related activities, commented on his duties as an officer and HPD policies, and-according to HPD-made "caustic, offensive, and disrespectful" statements regarding certain groups of citizens, including minorities, women, and the homeless.

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1. The parties agree that Nixon's indefinite suspension was effectively a termination from his position as an HPD officer.

2. It is undisputed that Nixon did not request or receive authorization to write articles in *002 Magazine*.

HPD eventually received a citizen complaint about Nixon's articles.[3] Thereafter, on or about September 28, 2005, HPD initiated an Internal Affairs investigation to determine if Nixon and his articles violated any HPD policies. The investigation determined that Nixon's activities related to authoring and publishing the articles violated numerous HPD policies and undermined the efficiency of the services provided by HPD. Consequently, HPD temporarily suspended Nixon for fifteen days without pay beginning on February 1, 2006.

B. Nixon's January 2006 Media Statements

On January 18, 2006, there was a highly publicized high-speed police pursuit involving state and local law enforcement officers, including HPD officers, and a fleeing suspect. After the fleeing suspect had been identified, HPD supervisors ordered all HPD officers to discontinue the pursuit but permitted them to follow at a distance. Nonetheless, the fleeing suspect eventually collided with an innocent motorist. Although Nixon was not involved in the pursuit, he knew about it from local television reports he saw while he was off-duty, at home, and preparing for his shift.

As soon as his shift started, Nixon proceeded to the scene of the accident–even though he was never

3. In the complaint, the citizen questioned whether HPD shared and/or condoned the views expressed in the article and whether the author could properly fulfill the duties of an HPD officer.

instructed to do so.[4] Upon arriving, Nixon asked a supervisor if anyone was going to make a statement to the media and suggested that he (Nixon) do so. After the supervisor failed to respond (other than by laughing), Nixon proceeded to speak to the media. Nixon, however, was not designated as an HPD spokesperson and was not authorized to make statements to the media at the scene. In his statement, Nixon criticized HPD's decision to disengage the pursuit and stated he was "embarrassed to be a police officer" because the department did not stop fleeing suspects.

The next day, on January 19, 2006, Nixon continued his criticism of HPD and its pursuit policy by voluntarily calling into multiple radio talk shows and by giving television interviews.[5] After his remarks on both days, Nixon informed the HPD media relations office that he had spoken to the media, presumably in an attempt to comply with his employer's media policy.

In response to these statements, HPD launched an investigation against Nixon. On June 2, 2006, HPD terminated Nixon's employment.

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4. In going to the scene of the accident, Nixon did not inform the dispatcher when he left his vehicle and failed to timely respond to the dispatcher's call for assistance in another matter.

5. During one of these interviews, Nixon recounted a prior incident in which he had violated HPD's pursuit policy, stating: "[I]t was a violation of policy and I admit that I did it, but you know what, I'm glad I did it because it prevented an innocent person from being injured . . . ."

II. STANDARD OF REVIEW

We review the district court's grant of summary judgment *de novo,* applying the same standard as the district court. *Atkins v. Hibernia Corp.,* 182 F.3d 320, 323 (5th Cir.1999). Summary judgment is appropriate when the record establishes "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

III. DISCUSSION

To establish a § 1983 claim for employment retaliation related to speech, a plaintiff-employee must show: (1) he suffered "an adverse employment action," *Alexander v. Eeds,* 392 F.3d 138, 142 (5th Cir.2004); (2) he spoke "as a citizen on a matter of public concern," *Garcetti v. Ceballos,* 547 U.S. 410, 126 S.Ct. 1951, 1958, 164 L.Ed.2d 689 (2006); (3) his interest in the speech outweighs the government's interest in the efficient provision of public services, *Pickering v. Bd. of Educ.,* 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); and (4) the speech "precipitated the adverse employment action." *Eeds,* 392 F.3d at 142.

In the case at hand, neither party disputes that Nixon's fifteen-day suspension and later termination constituted adverse employment actions or that his speech precipitated the adverse employment actions. Thus, we must determine: (1) whether-under *Garcetti*-Nixon was speaking in his role as an employee or as a

citizen on a matter of public concern, and (2) if he was speaking as a citizen, whether-under *Pickering*-his interest in speaking outweighed the government's interest in efficiency.

Under *Garcetti*, for an employee's speech to qualify for First Amendment protection, he must be speaking "as a *citizen* on a matter of public concern." 126 S.Ct. at 1958 (emphasis added). An employee is not speaking as a citizen-but rather in his role as an employee-when he "make[s] statements pursuant to [his] official duties." *Id.* at 1960. ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."). *Garcetti*, however, "did not explicate what it means to speak 'pursuant to' one's 'official duties.' " *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 692 (5th Cir.2007).

In *Williams*, the Fifth Circuit defined when an employee is speaking pursuant to his "official duties." *498 *Id.* at 693-94. This Court first noted that "a formal job description is not dispositive, . . . nor is speaking on the subject matter of one's employment." *Id.* at 692 (citing *Garcetti*, 126 S.Ct. at 1959, 1961). The Court went on to state that speech *required* by one's position as an employee is not protected by the First Amendment.[6]

6. This Court came to this conclusion because we found that job-required duties were present in *Garcetti*-i.e., that Ceballos's responsibilities as a prosecutor and calendar deputy *required* him to make the speech at issue. *Williams*, 480 F.3d at 693

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Williams, 480 F.3d at 693. However, because the speech at issue in *Williams* was not required by Williams's job responsibilities, the Court went on to "determine the extent to which, under *Garcetti*, a public employee is protected by the First Amendment if his speech is not necessarily required by his job duties but nevertheless is *related* to his job duties." *Id.* (emphasis added). This Court ultimately concluded that "[a]ctivities undertaken in the course of performing one's job are activities pursuant to official duties." *Id.*

If a court determines that an employee is not speaking in his/her role as an employee, but rather as a citizen on a matter of public concern, "the possibility of a First Amendment claim arises." *Garcetti*, 126 S.Ct. at 1958. To determine whether the First Amendment protects the employee's speech, a court proceeds to the *Pickering* balancing test and determines whether the interest of the government employer "in promoting the efficiency of the public services it performs through its employees" outweighs the employee's interests, as a citizen, "in commenting upon matters of public concern." *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731. Pertinent considerations in this balancing test are "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and

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("[W]hen Ceballos articulated his opinion about a case in a memorandum to his supervisor, alleging that the police acted inappropriately in gathering evidence, he did exactly what he was required to do.").

confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). Furthermore, "[b]ecause police departments function as paramilitary organizations charged with maintaining public safety and order, they are given more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employer." *Tindle v. Caudell*, 56 F.3d 966, 971 (8th Cir.1995).

With this framework in mind, we turn to the speech at issue in this case: Nixon's January 2006 media statements and Nixon's "The Insider" magazine articles.

A. Nixon's January 2006 Media Statements

Under *Garcetti* and *Williams*, it is clear that Nixon's January 18, 2006 media statement at the scene of the accident is not protected by the First Amendment because it was made pursuant to his official duties and during the course of performing his job. Nixon spoke to the media while on duty, in uniform, and while working at the scene of the accident. Before he made the statement, he made an attempt to get the approval of a supervisor to do so. His statement was intended to inform the public of the circumstances of the high-speed chase, the subsequent accident, and HPD's high-speed chase policy. Quite simply, there is "no relevant analogue to speech by citizens." *Garcetti*, 126 S.Ct. at 1961. The fact that Nixon's statement was unauthorized by HPD and that speaking to the press was not part of his regular

job duties is not dispositive-Nixon's statement was made while he was performing his job, and the fact that Nixon performed his job incorrectly, in an unauthorized manner, or in contravention of the wishes of his superiors does not convert his statement at the accident scene into protected citizen speech. Furthermore, speaking with the media is arguably one of an officer's job responsibilities, as HPD's Media Relations Policy directs: "In emergency or scene related situations, officers will provide the media with information regarding the scene or event in a timely manner."[7]

Nixon's January 19 statements to various radio talk shows and television news programs-considered in isolation-more closely approximate citizen speech, as he was presumably off-duty when he made such statements. These statements, however, constitute a continuation of Nixon's accident-scene statements the previous day criticizing HPD and its high-speed pursuit policy–which, as discussed above, Nixon made in his role as an employee. Consequently, this next-day forum should not affect our analysis, and these statements are seemingly controlled by *Garcetti.* However, even if Nixon's January 19 media statements constitute citizen speech, such speech–in conjunction with his January 18 statements–is not afforded First Amendment protection under *Pickering.*

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7. It is also relevant that Nixon complied with this policy by notifying the media relations office of his statement at the accident scene after he made it.

Nixon's interest in commenting upon matters of public concern-although significant-are outweighed by the government's substantial interests in the efficient provision of government services. Nixon's 2006 media statements undermined HPD's interests in maintaining discipline and order among employees and in promoting and maintaining public confidence in HPD. Nixon posed as an official HPD spokesperson at the scene of an accident and criticized HPD's handling of the high-speed pursuit at issue. Furthermore, in his January 19 media interviews, Nixon stated that he had knowingly disobeyed HPD's pursuit policy on a prior occasion and felt comfortable violating other direct orders because he has "civil service protection." Such statements and conduct smack of insubordination, and it is entirely reasonable for HPD to predict that such insubordination and likely acts of future insubordination would harm HPD's ability to maintain discipline and order in the department, morale within the department, and close-working relationships between Nixon, his fellow officers, and his supervisors.[8] Furthermore, HPD could

8. Nixon complains that "HPD failed to produce any evidence ... that [any of] Nixon's speech caused *actual* harm, and not just speculative or threatened harm, to the effective and efficient operations of the Department." (emphasis added). However, a government employer need not produce evidence of actual harm or disruption to governmental operations. *Connick v. Myers*, 461 U.S. 138, 152, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) ("[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."). Consequently, courts have consistently given

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reasonably predict that an officer criticizing HPD policy while masking as an official spokesperson at the scene of an accident and discussing his past violations of HPD policy and future willingness to violate such policies would bring the mission of HPD and the professionalism of its officers into disrepute.

B. Nixon's "The Insider" Articles

Nixon contends that the district court erred in determining that, under *Garcetti*, he was not speaking as a citizen when he wrote his articles for *002 Magazine* because: (1) writing the articles was not part of his job-required duties, (2) his speech occurred outside the scope of his employment and without any authorization, and (3) his comments were directed to the general public and constituted speech that private citizens could perform. Appellees, on the other hand, contend that Nixon was speaking in his role as an officer when he penned his articles because the magazine articles were directly related to and stemmed from his employment, his views were based upon his experiences as an HPD officer, and he took deliberate steps to link his views to his position as a police officer by identifying himself as an active HPD patrolman. However, we need not determine if Nixon's magazine articles were written in his role as an employee or citizen because, even if we assume that Nixon was

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"substantial weight to government employers' *reasonable predictions of disruption*, even when the speech involved is on a matter of public concern." *Waters v. Churchill*, 511 U.S. 661, 673, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) (emphasis added).

speaking as a citizen on matters of public concern, his magazine articles are unprotected by the First Amendment under *Pickering.*

HPD argues that Nixon's magazine articles "[held] HPD out to embarrassment and serve[d] to undermine public confidence in the professionalism of the department and its officers," thereby interfering with the efficient operations of HPD. Given that Nixon identified himself as an HPD police officer and wrote from the perspective of an HPD police officer, and the articles made patently offensive and insensitive comments regarding certain segments of the population,[9] it was reasonable for HPD to believe that such comments and the continuation of the publication of similar articles would hinder the important relationship between HPD and the citizens of Houston. In fact, Nixon's articles drew the attention of another local publication, *Houston Press.* The article in *Houston Press* identified Nixon as veteran officer of the HPD and commented that Nixon's articles "offer[ ] . . . an inside look at what HPD folks are thinking." The article also comments on Nixon's article that compares inner-city minority residents to "rats" and sarcastically states: "And the relationship between HPD and minorities takes another giant step forward."[10] HPD

9. Nixon's articles characterized inner-city minority residents as "rats," women with cats as mentally unstable, homeless people as "criminals," and children with problems as "freaks."

10. Additionally, Nixon's articles led a citizen to submit a complaint to HPD's Internal Affairs Division, in which the citizen (Cont'd)

convincingly states that its interest in maintaining public confidence is so important to its proper functioning because "HPD often relies upon members of the public to provide critical information, to serve as witnesses, to respect law enforcement authority, and to provide financial support."[11] Given the exposure of Nixon's articles to the Houston community and the caustic statements in some of his articles,[12] it was reasonable for HPD to believe that his articles would negatively impact the relationship between HPD and Houston citizens and generally bring "the mission of the [police department] and the professionalism of its officers into serious disrepute"–certainly legitimate and substantial

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(Cont'd)
questioned whether HPD shared and/or condoned the views expressed in the articles and whether the author could properly fulfill the duties of an HPD officer.

11. A good relationship with the Houston community is so important that "HPD expends considerable resources in an attempt to build and maintain public confidence and respect."

12. Not all of Nixon's articles contained denigrating statements aimed at segments of Houston's citizenry. Many of the articles were inoffensive and commented upon HPD policies that were arguably matters of public concern. Appellees, however, complain that such articles mischaracterized HPD policies, contained numerous misstatements of facts, and generally undermined community trust and respect in HPD. Regardless, Nixon's temporary suspension was based primarily on (and would have been justified based solely on) the articles that contained the aforementioned denigrating statements regarding the Houston citizenry.

interests, harm to which would undoubtedly impair the proper performance of HPD functions. *City of San Diego v. Roe*, 543 U.S. 77, 81, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004) (holding that the San Diego Police Department had a legitimate and substantial interest in preventing one of its officers from selling pornographic videos of himself on eBay where the officer appeared in uniform, performed a parody of an officer performing indecent acts in the course of official duties, and identified himself on eBay as a law enforcement officer).

Nixon, on the other hand, asserts the same interests in his magazine articles as he did with respect to his January 2006 media statements–his interest in commenting upon matters of public concern and the public's interest in receiving information on police protection and public safety issues. The value of Nixon's articles, however, is somewhat diminished by the fact that a significant amount of his speech is directed at denigrating certain segments of the Houston population. Although Nixon's interests are substantial, they are simply outweighed by the important government interests discussed above. We view his comments deriding and insulting the community not as legitimate criticism of police practices but as a direct blow to the relationship with the community HPD serves, and HPD must be able to prohibit such speech if it is to perform its function and maintain its professionalism.

We thus find that under a *Pickering* analysis, Nixon's magazine articles are not protected under the First Amendment. In so concluding, we are mindful of the

paramilitary structure of the police department and the greater latitude given their decisions regarding discipline and personnel regulations.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED JANUARY 25, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Civil Action No. H-06-296

THOMAS P. NIXON,

Plaintiff,

v.

CITY OF HOUSTON and HAROLD HURTT,

Defendants.

ORDER

Pending before the Court are Defendants' Motion for Summary Judgment (Document No. 39) and Motion to Exclude Plaintiff's Expert Witness (Document No. 30). Having considered the motions, submissions, and applicable law, the Court determines the motion for summary judgment should be granted and the motion to exclude Plaintiff's expert witness should be denied as moot.

Appendix B

BACKGROUND

Plaintiff Thomas Nixon ("Nixon"), a patrol officer with the Houston, Texas Police Department ("HPD"), filed the instant 42 U.S.C. § 1983 ("§ 1983") suit against the City of Houston ("City") and Chief of Police Harold Hurtt ("Chief Hurtt") for employment retaliation in violation of his First Amendment right to free speech. At all times relevant to the instant action, Nixon was employed as a police officer with HPD. Between December 2004 and September 2005, Nixon authored articles that were published in a local magazine.[1] In the articles, Nixon identified himself as an HPD police officer, discussed his police-related activities, and commented on his duties as an officer, certain groups of citizens, and HPD policies.[2]

After HPD received a citizen complaint about Nixon's magazine articles, it conducted an internal investigation to determine if he violated departmental policies in authoring them. Because an internal investigation revealed numerous policies were violated, HPD temporarily suspended him without pay for fifteen days beginning February 1, 2006.[3]

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1. Nixon did not request or receive authorization to write articles in *002 Magazine*.

2. Nixon is also an attorney with a private law office.

3. The internal investigation found Nixon's articles embarrassed the department, led the public to believe that his

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During HPD's internal investigation of his published articles and prior to his suspension, Nixon again violated departmental policies by speaking to the media without authorization. Specifically, on January 18, 2006, HPD officers, not including Nixon, were in hot pursuit of a fleeing suspect. Later, supervisors told them to disengage from the pursuit.[4] Nonetheless, the suspect was involved in a collision.[5] Although Nixon was not involved in the pursuit, he monitored it through local television reports while he was off duty and at home.

As soon as he arrived at HPD for his shift, Nixon drove his patrol car to the scene.[6] Once there, he asked a supervisor if anyone was going to make a statement to the media. When the supervisor failed to answer, Nixon

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views were HPD's views, and undermined the public's perception of its professionalism. Nixon violated HPD's policies because he failed to exhibit respect for the rights of individuals, to use sound judgment, and to exercise discretion.

4. HPD helicopters followed the suspect and news helicopters were broadcasting his movements. HPD disengaged because the department knew the identity of the suspect and because the suspect traveled in excess of 120 miles per hour, creating a high risk of injury.

5. The suspect drove the wrong way down an entrance ramp to a major highway and collided with another vehicle. The accident was carried live by most local television stations.

6. In going to and participating in the accident, Nixon left his patrol area, failed to inform the dispatcher when he left his vehicle, and failed to respond to the dispatcher's call for assistance in another matter.

voluntarily gave statements to the media regarding the chase.[7] In his statements, Nixon criticized HPD's decision to disengage the pursuit and stated he was "embarrassed to be a police officer" because the department did not stop fleeing suspects committing felonies.[8] Nixon alleges his statements "addressed whether current policies ensured the safety of the general public while still allowing police officers enough leeway to most effectively fulfill their duties and responsibilities." Nixon's interviews aired on television news Channels 2, 11, 13, 26 and 39.

On January 19, 2006, Nixon gave another television interview and voluntarily called two radio talk shows to discuss the previous day's events. Nixon admitted he had previously violated HPD's pursuit policy and that he was glad he had violated it. That day, in response to Nixon's

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7. Nixon acknowledges that he was not designated as an HPD spokesperson and was not authorized to make statements to the media at the scene. Defendants aver Nixon violated departmental policies concerning public statements by 1) making public statements about departmental policies without first obtaining permission from the Chief of Police; 2) failing to coordinate responses to media inquiries with the Office of Public Affairs; and 3) criticizing the Department or its policies in a manner that undermined HPD's effectiveness or interfered with HPD's ability to maintain discipline. They also aver Nixon violated disciplinary policy by openly challenging a supervisor's decision to disengage from hot pursuit.

8. Defendants aver Nixon's statements gave an erroneous impression he had been involved in the chase and that the public could have mistakenly believed Nixon to be an HPD spokesperson.

statements, HPD placed him on administrative status with pay pending an investigation into his conduct and reassigned him to another division.[9] Nixon also received a written order from HPD instructing him not to speak with the media regarding department policy or ongoing investigations in his capacity as an HPD officer and as a private citizen.[10] One week later, on January 27, 2006, Nixon brought claims against the City and Chief Hurtt alleging violations of his First and Fourteenth Amendment rights.[11]

On June 2, 2006, Chief Hurtt placed Nixon on indefinite suspension for violating numerous HPD policies in connection with his January 18-19, 2006 statements to the media.[12] Nixon appealed his fifteen-day suspension and his termination to the Police Officers' Civil Service Commission ("Commission"), which upheld

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9. A patrol officer on administrative status is generally assigned an office job.

10. The order directed him, in his capacity as a private citizen, to refrain from making statements that tend to "bring reproach, discredit, or embarrassment to the department."

11. Nixon also requested a temporary restraining order and preliminary injunction. After a hearing, the Court granted the temporary restraining order to the extent Defendants restricted Nixon's speech in his capacity as a private citizen. However, the Court later denied Nixon's application for a preliminary injunction.

12. The parties agree that Nixon's indefinite suspension is effectively a termination from his position as a police officer. Therefore, the Court refers to his indefinite suspension as a termination.

both disciplinary measures.[13] On October 27, 2006, the City and Chief Hurtt (collectively, "Defendants") moved for summary judgment in the instant action.

STANDARD OF REVIEW

Summary judgment is proper when "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The court must view the evidence in a light most favorable to the non-movant. *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997). Initially, the movant bears the burden of presenting the basis for the motion and the elements of the causes of action upon which the non-movant will be unable to establish a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-movant to come "forward with 'specific facts showing that there is a genuine issue for trial.' *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (quoting Fed. R. Civ.

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13. Nixon worked for HPD over ten years. In addition to the disciplinary actions in the instant action, Nixon's disciplinary history includes: a five-day suspension for insubordination for leaving his assigned post, a three-day suspension for leaving his post and being disrespectful to his supervisor; a three-day suspension for failure to adequately and properly investigate a burglary where a security camera showed Nixon drove by the business and departed within one minute; and written reprimands for an at-fault police-car accident, failure to complete in-service training, and making personal comments and criticisms in an offense report.

P. 56(e)). "A dispute about a material fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 (5th Cir. 1993) (citation omitted). The non-movant's bare assertions, standing alone, are insufficient to create a material issue of fact and defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

Conclusory allegations unsupported by specific facts will not prevent an award of summary judgment; the plaintiff cannot rest on his allegations to get to a jury without any significant probative evidence tending to support the complaint. *Nat'l Ass'n of Gov't Employees v. City Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 713 (5th Cir. 1994). Thus, the non-movant's burden cannot be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a scintilla of evidence. *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 215 (5th Cir. 1998). It is not the function of the court to search the record on the non-movant's behalf for evidence which may raise a fact issue. *Topalian v. Ehrman*, 954 F.2d 1125, 1137 n.30 (5th Cir. 1992).

LAW AND ANALYSIS

Nixon filed the instant action pursuant to § 1983 for violation of his right to free speech granted under the First and Fourteenth Amendments. He alleges the City and Chief Hurtt retaliated against him for exercising

his right to free speech in expressing his opinion as a public employee concerning matters of public concern.[14]

Defendants request summary judgment, averring 1) Nixon cannot establish a violation of his First Amendment rights; 2) Defendants are entitled to res judicata concerning the issue of Nixon's termination based on the Civil Service Commission's findings that HPD properly terminated Nixon; and 3) Chief Hurtt is entitled to qualified immunity from Nixon's claims against him in his individual capacity.[15]

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14. Nixon also appears to allege a cause of action against Chief Hurtt for negligent supervision under 42 U.S.C. § 1983. However, in order to state a viable substantive due process claim under § 1983, a plaintiff must demonstrate that the state official acted with culpability beyond mere negligence. *See Goad v. Lanier*, Civ.A. No. 06-0718, 2006 WL 1698014, at *2 (S.D. Tex. June 16, 2006). Moreover, a failure to supervise gives rise to § 1983 liability only in those situations in which there is a history of widespread abuse. *Lozano v. Smith*, 718 F.2d 756, 769 n.31 (5th Cir. 1983) (citation omitted). Because Nixon does not allege facts to support a history of widespread abuse or that Chief Hurtt's actions rise to a level beyond mere negligence, the Court finds Nixon has not stated a viable claim for negligent supervision.

15. Defendants aver Nixon cannot establish a First Amendment violation because his statements undermined HPD's legitimate interest in promoting the efficiency and effectiveness of the law enforcement services it performs for the public. In deciding to terminate Nixon, Chief Hurtt concluded Nixon's statements would cause problems in maintaining 1) discipline and order among officers; 2) harmony and close-working relationships between supervisors and officers; 3) public confidence in the integrity and competency of HPD; and 4) supervisory confidence in Nixon's ability to effectively perform

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Although Nixon filed claims against the City and Chief Hurtt, a suit against a government official in his official capacity is the same as a suit against the entity the employee represents. *Goad*, 2006 WL 1698014, at *3. Thus, any claims Nixon attempts to assert against Chief Hurtt in his official capacity are actually claims asserted against the City.[16] *See id.* Moreover, to the extent he asserts a claim against Chief Hurtt in his individual capacity, Chief Hurtt is entitled to qualified immunity if he did not violate a constitutional right and if his conduct was objectively reasonable. *See Finch v. Fort Bend Indep. Sch. Dist.*, 333 F.3d 555, 562 (5th Cir. 2003). Accordingly, the Court must determine whether Nixon has established a constitutional violation of his First Amendment rights.

To establish a § 1983 First Amendment retaliatory discharge claim, a plaintiff must prove 1) he suffered an adverse employment action, 2) his speech involved a matter of public concern,[17] 3) his interest in commenting

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his duties as a patrol officer. He also determined that Nixon's statements at the scene of a police investigation while on duty and in uniform could easily lead to public confusion concerning whether Nixon spoke as a citizen or as an HPD employee.

16. Nixon appears to assert claims only against Chief Hurtt in his official capacity. Nixon alleges Chief Hurtt, acting as an agent for the City, inflicted injury upon him by denying him his constitutional rights and retaliated against him by suspending him without pay and terminating him.

17. The Court notes the elements were established prior to the recent United States Supreme Court case, *Garcetti v.*

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on the matter of public concern outweighed a defendant's interest in promoting efficiency, and 4) his speech was a substantial or motivating factor behind a defendant's actions.[18] *Alexander v. Eads*, 392 F.3d 138, 142 (5th Cir. 2004); *Markos v. City of Atlanta*, 364 F.3d 567, 570 (5th Cir. 2004).

Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement as revealed by the entire record. *Markos*, 364 F.3d at 570; *Moore v. City of Kilgore*, 877 F.2d 364, 369 (5th Cir. 1989). Whether the speech at issue relates to a matter of public concern is a question of law to be resolved by a court. *Markos*, 364 F.3d at 570.

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Ceballos, 126 S.Ct. 1951 (2006). In *Garcetti*, the Supreme Court re-emphasized that the First Amendment protects speech of public employees made as a citizen on a matter of public concern. *Id.* at 1958. However, the *Garcetti* court held "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 1960. Thus, in determining whether Nixon meets the second element of his prima facie case, the Court considers not only whether Nixon's speech addresses a matter of public concern, but also whether he was speaking as a citizen or conversely, pursuant to his official duties.

18. The parties do not dispute Nixon's speech embodied in the magazine articles and his January 2006 statements to the media were a substantial or motivating factor behind HPD's decision to suspend and terminate him. Thus, Nixon meets the fourth element of his claim.

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A. Adverse Employment Action

In order to establish his § 1983 First Amendment retaliatory discharge claim, Nixon must prove he suffered an adverse employment action. *See Markos*, 364 F.3d at 570. In this case, HPD and Chief Hurtt suspended Nixon for fifteen days without pay for writing his magazine articles and terminated him for his January 2006 media statements. Nixon argues both measures are adverse employment actions.

Federal law protects individuals from employment retaliation that produces injury or harm.[19] *Burlington N. & Santa Fe. R.R. Co. v. White*, 126 S.Ct. 2405, 2414 (2006). In the context of retaliation for engaging in protected speech, Nixon must show HPD's disciplinary actions were materially adverse to him in that they might have dissuaded a reasonable police officer from exercising his First Amendment rights. *See id*; *see also Grother*, 2006 WL 3030769, at *3. The standard is

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19. The *Burlington Northern* court established the appropriate standard for a plaintiff to prove an employer retaliated against him. *Burlington Northern*, 126 S.Ct. at 2414-15. To be actionable retaliation, a plaintiff must show a defendant's retaliatory acts were materially adverse to him or her. *Id.* at 2415. Materially adverse means a reasonable employee might have been dissuaded from doing what he has a right to do. *See id.* Prior to *Burlington Northern*, the United States Court of Appeals for the Fifth Circuit required an employee to show an employer's alleged retaliation resulted in an ultimate employment decision. *See Grother v. Union Pac. R.R. Co.*, Civ. A. No. H-04-3279, 2006 WL 3030769, at *3 (S.D. Tex. Oct. 23, 2006).

objective and viewed from the reaction of a reasonable employee. *Burlington Northern*, 126 S.Ct. at 2415.

In the instant action, neither party disputes Nixon's termination is an adverse employment action. Thus, with respect to his termination, Nixon has established the first element of his claim. However, Nixon contends his suspension also constitutes an adverse employment action. A suspension without pay may rise to the level of an adverse employment action. *See Burlington Northern*, 126 S.Ct. at 2417 (finding many reasonable employees would find a 37-day suspension without pay to be a serious hardship). A reasonable employee may choose not to engage in speech criticizing HPD if he or she would forego a paycheck for fifteen days. *See id.* Thus, considering the facts in the light most favorable to Nixon, the Court finds his fifteen-day suspension without pay for writing the magazine articles is an adverse employment action.[20] Therefore, Nixon has established both disciplinary measures are adverse employment actions for the first element of his retaliatory discharge claim.

B. Speech as a Citizen on a Matter of Public Concern

HPD and Nixon disagree about whether Nixon's speech was made as a citizen on matters of public concern. In order to establish the second element of his

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20. Because Nixon's fifteen-day suspension is an adverse employment action, the Court must determine whether Nixon's magazine articles are speech made as a citizen on matters of public concern.

claim, Nixon must prove his speech was made as a citizen involving a matter of public concern. *See Garcetti*, 126 S.Ct. at 1958; *Markos*, 364 F.3d at 570. If the answer is no, Nixon has no First Amendment cause of action based on HPD's reaction to his speech. *See Garcetti*, 126 S.Ct. at 1958 (citing *Connick v. Myers*, 461 U.S. 138, 163 (1983) (finding a federal court is not the appropriate forum to review a public agency's personnel decision in relation to the employee's behavior)). If the answer is yes, then the possibility of a First Amendment claim arises, and the Court must determine whether Nixon and the public's interest in speech that addresses a matter of public concern outweighs HPD's interest in promoting the efficiency of the law enforcement services it performs through its employees. *See id.*; *Markos*, 364 F.3d at 570; *Moore*, 877 F.2d at 372.

At the outset, the Court notes a government employee does not relinquish all First Amendment rights merely by virtue of his or her employment. *Garcetti*, 126 S.Ct. at 1957; *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004). Government employees, who are often uniquely qualified to comment on governmental policies, may speak on matters of public concern that are of interest to the public at large. *City of San Diego*, 543 U.S. at 80. Moreover, a city may not discipline an employee by infringing on his or her constitutionally-protected interest in freedom of speech. *Moore*, 877 F.2d at 369.

However, when a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. *Garcetti*, 126 S.Ct. at 1958.

Government employers need a significant degree of control over their employees' words and actions in order to provide efficient public services. *Id.* Thus, a governmental employer may impose restraints on employees' speech that might otherwise be unconstitutional as applied to the general public. *City of San Diego*, 543 U.S. at 80. The Court must consider the form, content, and context of Nixon's speech to determine whether he spoke as a citizen on matters of public concern in his magazine articles and in his January 2006 media statements. *See Markos*, 364 F.3d at 570.

1. Form and Content

Whether Nixon's speech is entitled to First Amendment protection is determined by the form and content of his speech. *See Markos*, 364 F.3d at 570; *see Moore*, 877 F.2d at 369. Thus, the first inquiry is whether the form of the speech in question was public or private in nature. *Markos*, 364 F.3d at 571. The Court finds the form of Nixon's speech was public because his comments were broadcast over television and radio stations and published in magazines and on websites. *See id.*

Next, the Court considers the content of Nixon's speech. In the magazine articles, Nixon addressed various HPD policies. One article explained police officers are not allowed to have visible tattoos.[21] Another

21. Nixon indicated HPD made policies in order to profit from them. He stated that what "sickened him the most" about

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article addressed HPD's policy authorizing supervisors to have "take home cars."[22] Another article commented on HPD's policy that officers must give citizens an opportunity to evaluate police services.[23] Another article related HPD's alleged policy to prosecute citizens without any evidence.[24]

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the policy is that there were business cards on a work table that advertised services to remove tattoos. He wrote, "I wonder sometimes if policies are generated for no other purpose than to allow someone a chance to profit from the police officers. . . ." In this instance he suggested by getting "a referral fee for every officer that gets a tattoo removed."

22. Nixon indicated that while citizens like him pay $600 a month for car payments, gas, and insurance, HPD supervisors pay only $135 a month for a take home car on top of their salary of $75,000 to $130,000 a year. He indicated the chief of police has a driver who is a police officer, "an officer that could be out there answering your call for help."

23. Nixon was "vexed" officers were to give citizens a Call for Service Feedback Form. He indicated the form was a marketing tool and stated that "new policymakers at departmental headquarters have lost touch with the job that we are doing on the street every day." He wrote, "I can assure you that the one thing HPD is not suffering from is a lack of marketing thing. That whole 911 thing, it sells itself. No matter what kind of job I do, I can assure you they will call again, and again and again."

24. Using himself as an example, Nixon stated in the article that he had been suspended for insubordination when there was no evidence of it. Disavowing the testimony of his supervisor

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In sum, the content of Nixon's magazine articles alleges HPD makes policies to create a profit, improperly spends tax dollars, fails to protect the public because it diverts police resources to benefit supervisors, wastes resources on marketing, and inappropriately conducts investigations. Thus, the Court finds Nixon's magazine articles discussed HPD policies and these issues are matters of public concern. *See Garcetti*, 126 S.Ct. at 1962 (determining governmental inefficiency and misconduct are matters of considerable significance); *see City of San Diego*, 543 U.S. at 83-84 (finding "public concern is something that is a subject of legitimate news interest"); *see id.* at 84 (citing *Connick v. Myers*, 461 U.S. 138, 163 (1983) (finding employees' speech about the manner in which elected officials manage vital government agencies could be a matter of public concern) (Brennen, J., dissenting)); *see Pickering v. Bd. of Educ.*, 391 U.S. 563, 571-72 (1968) (concluding that whether a school system requires additional funds and how funds are spent constitute matters of legitimate public concern).

Concerning the content of his January 2006 media statements, Nixon criticized HPD's high speed pursuit policies. He stated HPD's policies prevented police officers from ending pursuits when suspects are running

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concerning the matter, Nixon wrote: "And in true HPD fashion, where a sergeant says one thing and an officer says another, the department assumed that the sergeant is the only one telling the truth. I was later informed by other personnel that the division commander disapproved of my outspoken nature."

from them, and the officers are afraid to do their jobs.[25] Nixon's January 2006 complaint raises serious concerns about whether HPD is properly protecting the public, and the Court finds this issue to be of public concern. *See Thompson v. City of Starkville*, 901 F.2d 456, 467 (5th Cir. 1990) (finding allegations of police officers' misconduct with possible ramifications on public safety constitute speech on a matter of public concern). Collectively, Nixon's magazine articles and media statements, including HPD's policies affecting public safety, the propriety of HPD's expenditures of public funds, and complaints about HPD's investigatory processes, are matters of public concern. *See Markos*, 364 F.3d at 570 (finding allegations of police misconduct and corruption are important matters of public concern).

2. Context

The context ofNixon's speech also aids the Court in its determination whether he was speaking as a citizen on a matter of public concern, which entitles his speech to First Amendment protection. *See Markos*, 364 F.3d at 570; *Moore*, 877 F.2d at 369. Moreover, as discussed

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25. Furthermore, he opined, "Chances are we would have been able to terminate this pursuit miles ago, and this infant and her mother would not be en route to the hospital right now." Responding to a reporter's question about why HPD backed off the pursuit, Nixon responded, "We were ordered to by our supervisors. It makes me embarrassed to be a police officer when we are afraid to do our jobs, and our jobs are to protect the public, and this is not protecting the public when infants are injured because we don't put a stop to suspects that are running from us committing felonies."

inter alia, the United States Supreme Court recently clarified a public employee's First Amendment protection and held "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 126 S.Ct. at 1960. Usually, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences when an employee speaks as a citizen addressing a matter of public concern. *Id.* at 1961. "When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny." *Id.* Accordingly, even though the content of Nixon's speech addresses matters of public concern, the Court determines whether Nixon's speech embodied in his magazine articles and his January 2006 statements was made as a citizen or whether it was made pursuant to his job duties. *See id.* at 1960.

A review of the magazine articles at issue indicate Nixon clearly identified himself as an HPD police officer in numerous articles.[26] Moreover, he spoke from the

26. Nixon generally begins his articles by referencing his job as a police officer. He began the article entitled "The Cat Index" by writing, "In my time as a police officer, I have met some interesting characters." In the article concerning police officers asking the public for feedback, he began by writing, "So showing up to work last week after a nice relaxing weekend, I was handed a new form that the Police Department has decided to use." In another article, he began by writing, "Ten years ago when I started at HPD, I would go to court and it would be packed."

perspective of an insider of HPD.[27] Nixon also directed his readers to his website where he posted a picture of himself in his police uniform.[28] Consequently, Nixon held himself out to the public as a police officer currently working for HPD and commented on his police-related experiences and views of HPD and its policies.

Merely discussing his views as a police officer does not necessarily mean that Nixon is speaking pursuant to his duties. *See Garcetti*, 126 S.Ct. at 1959 (finding the First Amendment protects some expressions related to an employee's job); *see also Pickering*, 391 U.S. at 572 (finding teachers as a class are community members most likely to have informed opinions about school operations and must be able to speak freely without fear of retaliatory dismissal). However, government employers need a significant degree of control over their employees' words and actions in order to provide efficient public services. *Garcetti*, 126 S.Ct. at 1958. Moreover, the context of his statements is relevant to

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27. Some examples include: "Here at the Houston Police Department, the chief, every assistant chief, every captain, every lieutenant and approximately 200 sergeants (who occupy a certain position or have enough seniority) get what is called a 'take home car.' He also opined, "It takes different types of people to make a good police department. Houston is no exception. Here at the police department, we have people who came from a university background and others with military experience."

28. He wrote, "Since I am a lawyer as well as a police officer, I can help you [get a group of citizens together to fix the problem of homeless criminals in the Montrose area of Houston]. **You can visit me at TNIXONLAW.COM**" (emphasis in the original).

the analysis of whether his statements are entitled to First Amendment protection. *Markos*, 364 F.3d at 570. Thus, the Court examines the entire context of his magazine articles to determine if Nixon's speech is entitled to First Amendment protection. *Markos*, 364 F.3d at 570.

In this regard, the Court notes Nixon's comments about certain segments of the Houston citizenry. He creates an analogy between rats and minorities.[29] He draws a correlation between the mental state of single women and the number of cats she owns.[30] He states the

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29. Nixon indicated rats are finding their way to HPD's property room and rummaging through evidence. He opined, "I can only imagine that there was a burgeoning drug trade in the inner city rat community. I won't be surprised if I ever find a gang of rats all wearing Nike jump suits, Rolex® watches, gold teeth and one carrying a nine 'milli.' Of course, they'll all claim that its not their cocaine and that I'm just a specieisist [sic]." Then he wrote, "Of course, I'll have to fill out a 'species' profiling card, just to prove that I'm not prejudiced towards rats. The department will find something trivial I did that was wrong and suspend me for it, so they can prove their sensitivity to the rat community." This article was discussed by local magazine/paper, www.HoustonPress.com, that commented, "And the relationship between HPD and minorities takes another giant step forward."

30. He writes that single women with one cat have self-esteem and abandonment issues; single women with two cats have co-dependency issues; single women with three cats are bi-polar; single women with four cats are paranoid schizophrenic; single women with five cats have hallucinations and delusions of grandeur; and single women with six or more cats are "riding the funny farm roller coaster to the nuthouse."

Montrose area of Houston is full of "worthless humans" and homeless criminals.[31] He states troubled young people are "freaks."[32]

Here, Nixon's comments do not engage the public in civic discussion; in contrast, they disparage Houston citizens and undermine HPD's efforts to serve them. *See Garcetti*, 126 S.Ct. at 1958 (finding society has an important interest in receiving well-informed views of government employees engaged in civic discussion). Moreover, the Court finds the public perceived Nixon to be speaking pursuant to his duties, not as a private citizen. The impetus to HPD's internal investigation occurred only after an unidentified citizen asked Chief Hurtt whether HPD condoned the views Nixon expressed in his articles. Speaking as a police officer, Nixon's magazine article comments could have and did portray to the public that his views may have been the

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31. He wrote, "The Montrose area has become littered with this wave of worthless humans, stealing, burglarizing homes, breaking into cars, spraying graffiti, dealing and using drugs of all types, and leaving mounds of trash all over Montrose Blvd., Hyde Park and Lovett." He opined, "Common sense tells you to shut down these [two well-funded] organizations [that service the area]. **I mean shut them down for good** (emphasis in the original). He also wrote, "I have no sympathy whatsoever for anyone who has given money to a homeless criminal and has then been victimized by one at a later date. **Stop enabling them!**" (emphasis in the original).

32. Nixon discussed his response while on duty to a call from a single mother who was having trouble with her son. He wrote, **"How do you discipline your child when your child is a freak?"** (emphasis in the original).

views of HPD. Additionally, Nixon's comments violate HPD's requirement that police officers refrain from criticizing HPD and respect the rights of all individuals in speaking to the public.[33]

The Court acknowledges that when government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection. *City of San Diego*, 543 U.S. at 80. However, in the instant action Nixon's topics were directly related to his employment. His views were based upon his experiences in the course of official duties. Moreover, Nixon took deliberate steps to link his views to his position as a police officer by referring to himself as a current, active HPD police officer, by conveying his perception of his on-duty experiences, and by directing his readers to his website where he posted a picture of himself in his police uniform. *See id.* at 81. These views aired to the public seriously undermined HPD's mission and its officers' professionalism. *See id.* (finding a police officer's showing himself in a police uniform and identifying himself in his profile as employed in law enforcement in order to sell his homemade adults-only videos on e-Bay brought the mission of the employer and professionalism of its officers into serious disrepute).

Accordingly, the Court finds Nixon violated HPD's internal policies because he failed to respect the rights of all individuals in the magazine articles. Moreover, his statements were made in the context of his duties because the public could have and did perceive him as a

33. *See supra* notes 5, 6.

spokesperson for HPD. Therefore, under *Garcetti*, he was not speaking as a citizen for First Amendment purposes, and the Constitution does not insulate his communications in his magazine articles from employer discipline. *See Garcetti*, 126 S.Ct. at 1960.

Next, the Court considers whether Nixon's January 2006 media statements were made as a citizen or whether they were made pursuant to his duties as a police officer. *See Garcetti*, 126 S.Ct. 1960. Government employers have heightened interest in controlling speech made by an employee in his or her professional capacity.[34] *See Garcetti*, 126 S.Ct. at 1960. Moreover, the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. *Id.* at 1961 (finding the county district attorney's memorandum criticizing the validity of an affidavit used to obtain a search warrant was made pursuant to his official duties and his criticisms were not insulated from employer discipline).

Nixon went to the scene of the accident while on duty and in uniform. Without HPD authorization, he made statements to the media critical of HPD's high speed pursuit policy. Accordingly, Nixon spoke to the media as a police officer fulfilling a duty to inform the public of HPD's efforts to protect them during a high-speed chase. *See Garcetti*, 126 S.Ct. at 1960 (finding the district attorney's memo was not protected by the First

34. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission. *Id.*

Amendment because he had a responsibility to advise his supervisor in a pending case). Thus, the Court finds when Nixon made these statements on duty and in uniform, he spoke pursuant to his official duties, and the First Amendment does not prohibit HPD from disciplining him. *See id.* at 1961. Because Nixon's magazine articles and media statements were made pursuant to his duties, he cannot establish a First Amendment cause of action based on HPD's reaction to his speech. *See id.* at 1958. Thus, the Court grants Defendants' motion for summary judgment.

C. Balancing the Parties' Interests

In the event Nixon's statements were made as a private citizen, the Court continues its analysis to determine if Nixon and the public's interest in his speech outweighs HPD's interest.[35] *See Moore*, 877 F.2d at 372. The City bears the burden to show its interest in disciplining Nixon for his speech outweighs Nixon and the public's interest. *Id.* The strength of the City's interest depends on the strength of Nixon's speech interest. *See id.*

The Fifth Circuit examines a number of factors when balancing the interests, including:

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35. Balancing the parties' interests is a means by which a court seeks to protect an individual and society's interest in free speech on matters of public concern and to respect a government employer's need to perform important public functions. *See Garcetti*, 126 U.S. at 1958-59.

> (1) the degree to which the employee's activity involved a matter of public concern; (2) the time, place, and manner of the employee's activity; (3) whether close working relationships are essential to fulfilling the employee's public responsibilities and the potential effect of the employee's activity on those relationships; (4) whether the employee's activity may be characterized as hostile, abusive, or insubordinate; (5) whether the activity impairs discipline by superiors or harmony among coworkers.

Brady v. Fort Bend County, 145 F.3d 691, 707 (5th Cir. 1998). However, the Fifth Circuit has recognized that this list is nonexclusive and is dependant upon the given situation. *Id.* at n.6.

Because police departments function as paramilitary organizations charged with maintaining public safety and order, they are given more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employer. *Tindle v. Caudell*, 56 F.3d 966, 971 (8th Cir. 1995). However, even though a government entity has broader discretion to restrict speech when it acts in its role as employer, the restrictions imposed must be directed at speech with potential to affect the entity's operations. *Garcetti*, 126 S.Ct. at 1958. Defendants aver HPD has a substantial interest in maintaining the public's confidence and respect and in maintaining discipline and order among its employees in order to function effectively and

efficiently to protect the public's safety. Nixon posits his and the public's interest in his speech outweighs the Defendants' interest.

Addressing the factors set forth in *Brady*, Nixon's magazine articles and January 2006 media statements involve matters of public concern. Moreover, his duty as a police officer to ensure the safety of the public is also a matter of public concern. *See Thompson*, 901 F.2d at 467. However, not all of Nixon's speech involved a matter of public concern because some speech merely related to his personal views. *See Brady*, 145 F.3d at 707.

In examining the time, manner and place of his speech, the time is mixed: Nixon wrote the magazine articles on his own time but made the media statements while on duty. *See Brady*, 145 F.3d at 707. His manner of raising the issues of public concern was not constructive criticism inviting public debate but was derogatory and demeaning criticism of his supervisors and the public. *See Garcetti*, 126 S.Ct. at 1962 (finding public employers should be "receptive to constructive criticism offered by their employees" and those who seek to expose wrongdoing are protected by law).

Addressing the third factor, Nixon's activity impairs his relationship and HPD's relationship with the public. *See Brady*, 145 F.3d at 707. Public confidence in HPD depends upon citizen interaction with police, and to an even greater extent, upon its image portrayed through the media. Nixon's magazine articles portray HPD as being composed of police officers just like Nixon, who

characterizes citizens as "rats," single women with cats as "paranoid schizophrenics," homeless persons as criminals, and children with problems as "freaks."

Additionally, members of the public recognized Nixon's views are not merely criticisms of HPD policies but rise to the level of insubordination.[36] *See Brady*, 145 F.3d at 707. Moreover, Nixon portrayed his lack of respect and concern for the safety of his fellow officers by stating he does not want a safe job.[37] Nixon's comment suggests he is more concerned about his personal job satisfaction, regardless of the consequences, than he is with the safety of his fellow officers. The Court finds the totality of Nixon's speech conveys insubordination rather than an interest in promoting the public's interest in civic discussion. *See Garcetti*, 126 S.Ct. at 1958; *Brady*, 145 F.3d at 707.

The manner and tone of Nixon's criticisms point to HPD's substantial and legitimate need to discipline Nixon in order to maintain public confidence and internal discipline and order. Moreover, the Court finds Nixon's speech has substantial potential to affect the entity's operations because Nixon's widely broadcast speech

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36. Although agreeing with some of Nixon's viewpoints, an out of state, former police officer commented on the radio, "Its not the Nixon Police Department. Its's the Houston Police Department. And [Nixon] should follow the chain of command."

37. Specifically, he said, "I mean, I like a little bit of danger. I like a little bit of excitement because that's what makes the job fun and interesting and that's why we do it. And this idea that we can make this job a hundred percent safe is just ridiculous. I mean, that's not why I signed up to be a police officer."

impacts the public perceptions of the professionalism of HPD's operations. *See Garcetti*, 126 S.Ct. at 1958. Therefore, considering the relevant factors in balancing the interests of the parties, even if Nixon's speech is construed as being that of a private citizen, HPD has established its interest outweighs Nixon and the public's interest in the matters he raised. Accordingly, Nixon has not established a First Amendment cause of action. *See Garcetti*, 126 S.Ct. at 1958.

CONCLUSION

Based on the foregoing, the Court hereby

ORDERS Defendants' Motion for Summary Judgment (Document No. 39) is GRANTED.[38] The Court further

ORDERS Defendants' Motion to Exclude Plaintiff's Expert Witness is DENIED as moot.

SIGNED at Houston, Texas, on this 25 day of January, 2007.

s/ David Hittner
DAVID HITTNER
United States District Judge

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38. Because Nixon fails to establish the elements of his claim, Defendants' arguments that they are entitled to *res judicata* based upon the Civil Service Commission's findings and that Chief Hurtt is entitled to qualified immunity are moot. *See Alexander*, 392 F.3d at 144 (finding district court properly granted summary judgment on the issue of qualified immunity because the plaintiffs failed to successfully allege a violation of an established right when they failed to support their protected speech retaliation claim).

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No. 07-1200

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In The
Supreme Court of the United States

THOMAS P. NIXON,

Petitioner,

v.

CITY OF HOUSTON AND HAROLD HURTT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Fifth Circuit correctly applied the *Pickering* balancing test when considering a municipality's interest in providing effective and efficient police services.

II. Whether Petitioner fails to show a true conflict among the various circuit courts' application of *Garcetti v. Ceballos*, 547 U.S. 410 (2006) worthy of this Court's review, especially where any conflict would be immaterial to the outcome of the case.

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STATEMENT OF THE CASE

Petitioner is a former patrol officer with the City of Houston Police Department ("HPD") and a licensed practicing attorney.[1] Petitioner claims that his 15-day temporary suspension (for certain articles he published) and his later termination from HPD (for certain statements he made to the media) constitute employment retaliation in violation of his First Amendment right to free speech. Both the District Court and the Fifth Circuit found that Petitioner's speech was not protected by the First Amendment.

I. Factual Background.

1. "The Insider" Articles.

Between May 2004 and May 2006, Petitioner wrote a monthly column entitled "The Insider" in 002 Magazine, a local Houston periodical. In the articles, Petitioner identified himself as an HPD police officer and discussed his police-related experiences, his job duties, and HPD policies. The method and manner in which Petitioner expressed his views in many of the articles were offensive, insensitive, and disrespectful to the particular citizens and groups that Petitioner encountered on his patrol. For example, in his articles, Petitioner characterized inner-city residents as "rats," single women with cats as mentally unstable, homeless people as "criminals," and children with problems as "freaks."

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[1] Petitioner went to law school and was admitted to the State Bar of Texas (2005) while employed as an HPD officer.

HPD initiated an investigation of the articles through its Internal Affairs Division after receiving a citizen's complaint about one of the articles. In the complaint, the citizen questioned whether HPD shared and/or condoned the views expressed in the article and whether Petitioner could properly fulfill the duties of an HPD officer. The HPD investigation determined that Petitioner's writing and publishing of the articles violated numerous HPD policies and undermined the efficiency of the services provided by HPD. As a result, HPD suspended Petitioner without pay for fifteen days.

2. Petitioner's January 2006 Media Statements.

On January 18, 2006, a lengthy motor vehicle pursuit involving local and state law enforcement officers and a fleeing suspect took place on the streets of Houston. After the suspect had been identified, HPD supervisors involved in the chase ordered all police officers to discontinue hot pursuit of the suspect. Nonetheless, approximately 30 minutes after discontinuing hot pursuit, the suspect's vehicle collided with an innocent motorist.[2]

Petitioner was not one of the HPD officers involved in the chase, and was never directed by HPD to go to the accident scene where the chase terminated. Instead, Petitioner learned about the pursuit by watching it on television while preparing for his shift. When his shift began, Petitioner unilaterally decided

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[2] The chase and accident was carried live by most local television stations.

to drive his patrol car to the crash site. While at the accident scene, Petitioner asked a supervisor if anyone was going to make a statement to the media, and suggested that he (Petitioner) do so. Thinking that Petitioner was joking, the supervisor laughed and did not otherwise respond to Petitioner's question. Nevertheless, despite his lack of involvement in and information about the chase, Petitioner decided to speak to the media.

In his statement to the media, Petitioner criticized HPD's decision to disengage the pursuit and stated that he was "embarrassed to be a police officer" because the department did not stop fleeing suspects. The next day, Petitioner continued his criticism of HPD and its pursuit policy by voluntarily calling into multiple radio talk shows and by giving television interviews. In one interview, Petitioner admitted that he had previously violated HPD's pursuit policy and that he was glad he had violated it. On another radio talk program, Petitioner responded to a question about a possible "dissension in the ranks" at HPD by stating, "I wouldn't call it dissension. I think I would call it a degree of disgust because we are out there trying to do a job."[3] Petitioner also agreed on that radio program that he felt "comfortable" violating a direct order given him by a supervisor because he has "civil service protection as a police officer," which he never

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[3] Petitioner's use of the term "we" implied that he spoke on behalf of other HPD officers.

"enjoyed" in the Army.[4] On both January 18 and 19, 2006, after finishing his remarks, Petitioner called HPD media relations office to inform the office that he had spoken to the media, presumably in an attempt to comply with HPD's media policy.[5]

An HPD Internal Affairs investigation of Petitioner's media statements determined that Petitioner had violated numerous policies and general orders. HPD also concluded that Petitioner's public comments would cause problems in maintaining discipline and order among officers, the harmony and

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[4] On February 21 and 22, 2006, the district court held a preliminary injunction hearing in connection with Petitioner's lawsuit. The hearing was held prior to the conclusion of HPD's investigation into Petitioner's media statements. During the hearing, Petitioner testified that he had, in the past, deliberately disobeyed the pursuit policy, which he considered to be a lawful order, and stated his belief that officers should be permitted to make judgment calls as to whether to violate an existing policy. Further, Petitioner admitted that he would use deadly force to end a pursuit, which he knew was a violation of existing HPD policy, if he believed it would prevent innocent people from being injured. Petitioner also professed that it was "absolutely" the role of a police officer to make an admission of liability on the City's part if it created a public discourse on what the officer believed was a matter of public concern.

[5] HPD's Media Relations policy states: "In emergency or scene related situations, officers will provide the media with information regarding the scene or event in a timely manner. The Media Relations office will be notified of this release of information as soon as possible after the information has been released. Examples of this type of activity include shootings, robberies, accidents, disaster, etc."

close working relationships between supervisor and officers, the public confidence in the integrity and competency of HPD, and the supervisory confidence in the ability of Petitioner to effectively perform his duties as a patrol officer. Thus, Petitioner's employment was terminated.[6]

II. Procedural Background.

Petitioner filed his Original Complaint and Application for Temporary Restraining Order and Preliminary Injunction on January 27, 2006, seeking money damages and injunctive relief for alleged employment retaliation by HPD against him. Following a preliminary injunction hearing held on February 21-22, 2006, United States District Judge David Hittner denied Petitioner's request for a preliminary injunction on March 3, 2006. On or about October 27, 2006, HPD filed their Motion for Summary Judgment. On January 25, 2007, Judge Hittner granted summary judgment in HPD's favor and signed

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[6] Pursuant to his rights as a civil service employee, Petitioner appealed to the Police Officers' Civil Service Commission (the "Commission") both his 15-day temporary suspension for authoring the *002 Magazine* articles and his termination for his January 18 and 19, 2006 media statements. Petitioner was represented by counsel at the hearings, had the opportunity to call witnesses in his defense, and cross-examined HPD's witnesses. Ultimately, the three-member Commission panel assigned to hear the appeals unanimously upheld both Petitioner's 15-day suspension and his termination, with both panels specifically finding that the charges contained in the suspension and termination letters were true and correct and represented a sufficient basis or just cause for the disciplinary actions.

a Final Judgment dismissing Petitioner's claims. Petitioner filed his Notice of Appeal on or about February 22, 2007. The Fifth Circuit affirmed. In sum, the Court determined that Petitioner's January 2006 media statements, for which he was terminated, were made pursuant to his official job duties and that the Constitution did not insulate such speech from his employer's discipline. The Court also found that even if Petitioner's media statements and earlier articles (for which he was temporarily suspended) constituted citizen speech addressing matters of public concern, the speech was unprotected by the First Amendment under *Pickering*.

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit's Ruling In This Case Does Not Require A "Clarification" To The *Pickering* Balancing Test.

Petitioner takes issue with the Fifth Circuit's conclusion that his interest in commenting upon matters of public concern were outweighed, in this case, by HPD's substantial interests in the efficient provision of law enforcement services. Rather than point to any error of law in the Court's *Pickering* analysis, Petitioner argues that the *Pickering* balancing test should be "clarified" to require governmental entities to show that an employee's speech caused *actual* harm to the effective and efficient operations of the entity. Further, Petitioner argues that no weight should be given to the efficacy and efficiency of police department functions arising from public perceptions of the inappropriate activities of police officers. Neither of Petitioner's arguments are

availing as both have already been rejected by this Court.

1. A government employer need not produce evidence of actual harm or disruption to governmental operations.

The "actual harm" standard urged by Petitioner is analogous to the standard previously rejected by this Court in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983). In *Connick*, an assistant district attorney was terminated after she circulated to her co-workers a questionnaire concerning, among other things, whether the employees felt pressure to work in political campaigns. The district court, in finding for the employee, held that the questionnaire involved matters of public concern and that the employer had not "*clearly demonstrated*" that the survey "*substantially interfered*" with the operations of the District Attorney's office. On review, this Court held that the district court erred in imposing "an unduly onerous burden" on the state to justify the employee's discharge. *Connick*, 467 U.S. at 149-50. As explained in *Connick*, the employer's burden in justifying a particular discharge varies depending on the nature of the employee's expression and requires "a full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Id.* at 150. Moreover, prolonging the retention of a disruptive employee until the harm has become manifest and caused an actual impairment to the efficiency of the public services provided is neither necessary nor advisable. *Id.* at 151-52; *see also Waters v. Churchill*, 511 U.S. 661, 668, 114 S.Ct. 1878 (1994). Indeed, as noted in *Waters*, this Court has consistently

given substantial weight "to government employer's *reasonable predictions of disruption*, even when the speech involved is on a matter of public concern." 511 U.S. at 673 (emphasis added).

The Court's admonition in *Connick* that disruption of the office and destruction of working relationships need not be manifest before taking action is especially applicable in the context of law enforcement, where there exists, by the very nature of the services provided, an overriding interest in maintaining discipline, efficiency, and effectiveness in protecting the public safety and the safety of police officers. This special recognition to the heightened need for deference to the employment decisions of those responsible for ensuring public safety has been well-articulated by the Eighth Circuit:

> It has been recognized that a police department has a more significant interest than the typical government employer in regulating the speech activities of its employees in order to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence. Because police departments function as paramilitary organizations charged with maintaining public safety and order, they are given more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employer. The public safety employer's determinations of both the potential for disruption as a result of the speech, as well as the employer's response to the actual or perceived disruption are entitled to considerable judicial deference.

Tyler v. City of Mountain Home, 72 F.3d 568, 570 (8th Cir. 1995); *see also Kokkinis v. Ivkovich*, 185 F.3d 840, 845 (7th Cir. 1999) ("speech that might not interfere with work in an environment less dependent on order, discipline, and esprit the corps could be debilitating to a police force"); *Moore v. City of Wynnewood*, 57 F.3d 924, 934 (10th Cir. 1995) (refusing to grant First Amendment protection to a police officer's speech at a city council meeting because the officer's criticisms of the department's policies threatened department morale and the chain of command); *Tindle v. Caudell*, 56 F.3d 966, 971 (8th Cir. 1995) ("because police departments function as paramilitary organizations charged with maintaining public safety and order, they are given more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employment.")

Petitioner's reliance on *Kinney v. Weaver*, 367 F.3d 337 (5th Cir. 2004) for the proposition that *actual* harm must be shown to the efficient operations of the employer is misplaced. Far from establishing any hard and fast rule against preemptive action prior to the disruption of government operations by an employee's speech, as Petitioner suggests, the Court merely held that government official's "predictions of disruption must be *reasonable*." *Id.* at 364. In the present case, the Fifth Circuit had considerable evidence before it to conclude that HPD's "prediction of harm" was reasonable.[7] Thus, the Fifth Circuit correctly applied

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[7] Chief Hurtt's lack of confidence in Petitioner's ability to continue to effectively perform his duties as a patrol officer was shared by the Assistant Chief over Petitioner's patrol division, as well as by

the balancing test as required by *Pickering* and its progeny.

2. Law enforcement agencies have a substantial interest in maintaining the mission and professionalism of its officers.

Petitioner unconvincingly claims that any impairment his speech caused to HPD's relationship with the citizenry it serves is of no importance when considering the effectiveness and efficiency of the public services provided by HPD. Petitioner fails to recognize that such "external" harm, as he describes it, directly impairs the mission and proper performance of HPD's police functions. As noted by the Fifth Circuit in its opinion, "HPD often relies upon members of the public to provide critical information, to serve as witnesses, to respect law enforcement authority, and to provide financial support." (Pet. App. A, 13a). Petitioner's speech, and his magazine articles in particular, made patently offensive and caustic comments about certain segments of the population he was sworn to protect and serve. Given that Petitioner identified himself in the articles as an HPD police officer, and wrote from the perspective of an HPD "insider," it was reasonable for HPD to conclude that Petitioner's speech would negatively impact public confidence in HPD and generally bring the mission of HPD and the professionalism of its officers into serious

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Petitioner's divisional commander, who testified that he was "unnerved" by some of Petitioner's statements, and agreed that Petitioner's comments about being comfortable violating lawful orders would not instill public confidence in HPD or its officers.

disrepute, thereby interfering with the efficient operations of HPD.[8]

Petitioner's reliance on *Flanagan v. Munger*, 890 F.2d 1557, 1566-67 (10th Cir. 1989) and *Berger v. Battaglia*, 779 F.2d 992, 1000-01 (4th Cir. 1985), to the extent that they minimize the significance of community trust and respect on the efficiency and efficacy of police functions, is severely undermined by this Court's subsequent decision in *City of San Diego v. Roe*, 543 U.S. 77, 125 S.Ct. 521 (2004). In *Roe*, a police officer was terminated for selling pornographic videos of himself on eBay. In the videos, the officer appeared in uniform and performed a parody of an officer performing indecent acts in the course of official duties. *Id.* at 81. In holding that Roe's speech was not entitled to First Amendment protection, this Court had little difficulty in finding that Roe's activities, when known to the public, would be "detrimental to the mission and functions of the employer." *Id.* at 84; *see also Dibble v. City of Chandler*, 515 F.3d 918, 928 (9th Cir. 2008) (holding that the City's interest in maintaining efficient operation of police department outweighed police officer's interest in maintaining sexually explicit website featuring himself and his wife because officer's activities were detrimental to mission

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[8] Petitioner's article comparing inner-city minority residents drew the attention of another local publication, the *Houston Press*. The article in the *Houston Press* identifies Petitioner as a veteran HPD officer and describes Petitioner's article by stating, "It offers, as you might expect, an inside look at what HPD folks are thinking." It then specifically quotes from Petitioner's article and sarcastically concludes, "and the relationship between HPD and minorities takes another giant step forward."

and functions of department by undermining public respect and confidence); *Thaeter v. Palm Beach County Sheriff's Office*, 449 F.3d 1342, 1356 (11th Cir. 2006) (noting that police officer's public sexual activities, once known, would interfere with the functions and mission of police department because it undermined public confidence in the department).

Finally, Petitioner's claim that he is being subjected to a "heckler's veto" is misplaced. As discussed by the Ninth Circuit in *Dibble*, judicial concern about a heckler's veto has generally involved restrictions to a citizen's speech based upon the expected disorderly reaction to the speech by members of an audience. *Dibble*, 515 F.3d at 928. "Those worries do not directly relate to the wholly separate area of *employee* activities that affect the public's view of a governmental agency in a negative fashion, and, thereby, affect the agency's mission." *Id.* at 928-29 (emphasis added). Petitioner's heckler's veto argument also ignores the unique public safety mission of a police department and its necessary daily interaction with the public. *Id.* Thus, the Fifth Circuit's consideration of the public's perception of Petitioner's speech when it weighed the potential for disruption to HPD's police functions was appropriate.

II. Petitioner Has Not Identified A Conflict In The Various Circuit Courts' Application of *Garcetti*.

In *Garcetti v. Ceballos*, this Court noted that employers have a "heightened interest in controlling speech made by an employee in his or her professional capacity" because supervisors have a need to "ensure that their employee's official communications are

accurate, demonstrate sound judgment, and promote the employer's mission." 547 U.S. 410, 126 S.Ct. 1951, 1960 (2006). Thus, this Court held that when public employees speak pursuant to their official duties, they are not speaking as citizens, and their speech is not afforded constitutional protection. *Garcetti,* 126 S.Ct. at 1960. In *Garcetti,* this Court did not articulate a comprehensive framework for defining what it means to speak "pursuant to official duties," but instead sought to encourage lower courts to view the facts of a given case from a "practical" perspective. *Id.* at 1961. Although various circuit courts have employed their own nuances and emphases when making this practical determination, any differences spring from the enormous variety of fact situations presented in such cases, and not from the use of different or inconsistent definitions of what constitutes speech "pursuant to official duties."

1. The Fifth Circuit's decision does not conflict with the other courts of appeal.

The Fifth Circuit has held that "activities undertaken in the course of performing one's job are activities pursuant to official duties" under *Garcetti. Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 693 (5th Cir. 2007). Furthermore, the fact that an employee's speech is not directly authorized or required by a person's job duties does not necessarily convert employee speech into protected citizen speech. *Id.* at 694. The relevant inquiry is whether the speech was made in the course of performing one's job duties. *Id.*

The Fifth Circuit's definition of what it means to speak "pursuant to official duties" is not in conflict with other circuit courts. *See Mills v. City of Evansville*, 452 F.3d 646 (7th Cir. 2006) (police officer's criticism of department's reorganization plan were considered remarks made "in her capacity as a public employee contributing to the formation and execution of official policy); *Green v. Board of County Commissioners*, 472 F.3d 794, 801 (10th Cir. 2007) (employee's communications with outside vendor, while not authorized or required by employee's job responsibilities, nevertheless stemmed from her job and were the types of communications that would be attributable to employer); *Battle v. Bd. of Regents*, 468 F.3d 755, 761 (11th Cir. 2006) (construing a university employee's report, which alleged improprieties in management of financial aide funds, as "pursuant to her official responsibilities"). Indeed, there is little, if any, distinction between the circuit courts in determining what constitutes speech "pursuant to official duties." When viewed as a whole, the circuit court cases distinguish between speech that is "'the kind of activity engaged in by citizens who do not work for the government' and activities undertaken in the course of performing one's job." *Williams*, 480 F.3d at 693 (quoting *Garcetti*, 126 S.Ct. at 1962).

In struggling to find a conflict where none exists, Petitioner incorrectly portrays the decisions in *Casey v. West Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007) and *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006) as limiting *Garcetti's* scope and force to include only that speech that is expressly authorized or approved by the employee's supervisor. Contrary to Petitioner's assertions, both *Casey* and *Freitag*

acknowledge that the critical inquiry is whether the speech at issue was made "pursuant to official duties." *Casey*, 473 at 1329; *Freitag*, 468 at 545. Neither case, however, prohibits *Garcetti's* application to speech that is not authorized but is nevertheless undertaken in the course of performing one's job duties. Indeed, in *Casey*, certain communications the employee made that were directly contrary to her principal's instructions were nevertheless considered by the court as having been made pursuant to her official duties. *Casey*, 473 F.3d at 1331. Therefore, Petitioner has failed to identify that a true conflict exists among the various courts of appeal.

2. The Fifth Circuit correctly found that Petitioner's media interviews were made pursuant to his official duties.

In the present case, it is easy to conclude that Petitioner's media statements were made pursuant to his official duties and during the course of performing his job duties. Petitioner spoke with the media on January 18, 2006 *while on duty, in uniform, and while working at the scene of a police investigation*. Further, he made an attempt to gain supervisory approval to speak to the media prior to making his statements. Petitioner's January 19 statements to radio talk shows and television news programs were simply a continuation of his accident-scene statements the previous day, which were made in his role as an employee. On both days, Petitioner called the media relations department to let them know he spoke to the media. Why would Petitioner inform the HPD media office of his statements if he were speaking solely as a private citizen, rather than as an HPD employee?

Perhaps most significantly, Petitioner admitted in his Original Complaint that "on or about January 18, 2006 through January 19, 2006, Plaintiff, ***in the course of his official duties as a police officer with the Houston Police Department***, made public remarks regarding the lack of effectiveness in the policies and procedures of the Houston Police Department." (emphasis added). It is simply disingenuous for Petitioner to now proclaim that he was not acting in the course of performing his job duties.

Finally, it is relevant that Petitioner's media statements were circumscribed by his performance "expectations" and "professional responsibilities" as an HPD officer. *Garcetti*, 126 S.Ct. at 1960-62. As an HPD officer, Petitioner's "professional responsibilities" indisputably included the following:

- A duty not to commit any act that tends to bring reproach, discredit, or embarrassment to the department;

- A duty to be courteous, civil, and respectful to superiors, subordinate employees, coworkers, and citizens;

- A duty not to make false, untrue, or misleading statements, verbal or written;

- A duty to refrain from making public statements about departmental policies or initiatives, or statements that could be construed as representing the department's official policy or position, without first obtaining permission from the chief of police;

- A duty to refrain from criticizing or ridiculing the department or its policies in a manner that is defamatory, obscene, or unlawful, or that undermines the effectiveness of the department, interferes with the maintenance of discipline, or recklessly disregards truth or falsity; and

- A duty not to engage in any form of speech likely to be construed as racial or religious slur or joke.

Petitioner's media statements were governed by these official policies, and as an HPD officer, Petitioner was expected to adhere to such policies as part of his "professional responsibilities." *See Garcetti,* 126 S.Ct. at 1960.

3. Granting the Petition would serve no practical purpose, since the *Pickering* balancing tests provides a separate and independent basis for dismissal of Petitioner's lawsuit.

Even where a clear conflict exists among the circuits, certiorari may be denied where resolution of the conflict would be irrelevant to the ultimate outcome of the case. Here, the Fifth Circuit found that even if Petitioner's media statements constitute citizen speech, rather than employee speech, Petitioner's statements would not be afforded First Amendment protection under *Pickering*. Thus, this case would present a poor vehicle for resolving any existing conflict regarding the lower courts' application of *Garcetti*.

CONCLUSION

For the above reasons, the Court should deny Petitioner's Petition for Writ Certiorari.

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